SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible]

KINSELLA, WARDEN, APPELLANT,

vs.

UNITED STATES EX REL. SINGLETON

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

FILED [illegible]

PROBABLE JURISDICTION NOTED FEBRUARY 24, 1958

Supreme Court of the United States

OCTOBER TERM, 1958

No. 571

KINSELLA, WARDEN, APPELLANT,

vs.

UNITED STATES EX REL. SINGLETON

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

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[fol. 1] **IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON**

PETITION FOR WRIT OF HABEAS CORPUS

No. 2145

ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, Warden of the Federal Reformatory for Women, Alderson, West Virginia, RESPONDENT

RELEVANT DOCKET ENTRIES

1958

August 12—Order filing Petition for Writ of Habeas Corpus, etc.

August 12—Filed Petition for Writ of Habeas Corpus.

August 12—Issued Writ of Habeas Corpus and 2 copies.

August 12—Order on pauper affidavit, permitting Petitioner to prosecute proceeding to conclusion without prepayment fees.

August 15—Filed Marshal's return on Writ of Habeas Corpus.

August 26—Filed Return and Answer of Respondent and Exhibits A, B, and C, therewith.

Sept. 6—Filed Court's Opinion.

Sept. 8—Order discharging Joanna S. Dial from the custody of Nine Kinsella, Warden of the Federal Reformatory for Women, Alderson, W. Va.

Sept. 8—To certified copy of Order to U. S. Marshal.

Sept. 8—Filed Marshal's return on Order discharging Joanna S. Dial from the custody of Nina Kinsella, Warden of the Federal Reformatory for Women, Alderson, W. Va.

Oct. 8—Filed Notice of Appeal to the Supreme Court of the United States with Proof of Service thereon.

Oct. 15—Filed Cross Designation of Contents of Record on Appeal.

Nov. 17—To preparing and certifying record on appeal.

* * * * *

[fol. 2] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

No. 2145

ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, Warden of the Federal Reformatory for Women, Alderson, West Virginia, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS—Filed Aug. 12, 1958

To the Honorable United States District Court for the Southern District of West Virginia.

The petition of Alebrta Singleton respectfully shows:

1. Petitioner, as mother of Mrs. Joanna S. Dial, makes application herein on behalf of Mrs. Joanna S. Dial, for a writ of habeas corpus in that said Mrs. Joanna S. Dial is unlawfully detained and restrained of her liberty by Nina Kinsella, and is now in custody of the said Nina Kinsella, at the Federal Reformatory for Women, Alderson, West Virginia.

2. The cause or pretext of such detention and restraint is a sentence of three (3) years based upon a conviction for involuntary manslaughter in a Court Martial by the 2nd Armored Division, U. S. Army at Bad Kreuznach, Germany, on July 29, 1957, under Article 2 (11) of the Uniform Code of Military Justice. Article 2 (11) of the Uniform Code of Military Justice is based on Article I, Section 8, Clause 14, of the United States *Constitution*, empowering Congress "to make Rules for the Government and Regulation of the Land and Naval Forces."

[fol. 3] 3. Said detention and restraint is unlawful in that Article III, Section 2, of the United States *Constitution* provides that:

"The Trial of all Crimes, except in Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed."

The United States Supreme Court in *Reid* v. *Covert*, 354, U.S. 1, decided June 10, 1957, held that under our Constitution courts of law alone are given power to try civilians for their offenses against the United States. This decision was limited to cases in which the maximum punishment would be death. Mr. Justice Frankfurter in his concurring opinion in this case states that this limitation is only by virtue of the fact that the question in the case involved only a capital punishment case and that lesser offenses were not considered.

Mrs. Joanna S. Dial was a civilian when she was tried and convicted by Court Martial, and, therefore, her conviction and incarceration are in violation of Article III, Section 2, of the *Constitution* granting her the right to trial by jury.

4. Whereas, Mrs. Joanna S. Dial was convicted July 29, 1957, and the conviction was appealed by the Judge Advocates' office and the appellate review is now pending, the last action having been taken September 9, 1957. When she was ordered committed to the Women's Federal Reformatory in Alderson, West Virginia, and whereas, the appellate review cannot be expedited, the determination of the lawfulness by appellate review is inadequate, as said Mrs. Joanna S. Dial has now been detained for a period amounting to one-fourth (1/4) of the sentence imposed. This Writ of Habeas Corpus is the most expedient and adequate remedy for determination of the lawfulness of the detention.

[fol. 4] 5. No other application for this Writ has heretofore been made to any other court or judge.

WHEREFORE, petitioner prays that a Writ of Habeas Corpus issue as herein directed to said Nina Kinsella, commanding her to produce the body of Mrs. Joanna S. Dial before this Court at the time and place to be specified in said Writ, to the end that the Court may inquire

into the cause of Mrs. Joanna S. Dials' detention, and that Mrs. Joanna S. Dial be ordered discharged from the detention and restraint aforesaid.

ALBERTA SINGLETON,
Petitioner.

STATE OF TENNESSEE)
) :
COUNTY OF KNOX)

ALBERTA SINGLETON, a resident of Knox County, Tennessee, having been duly sworn according to law, states that she is the petitioner herein, and that she has read the foregoing petition and knows the contents; that the same are true of her own knowledge, except those things stated upon information and belief, and as to those matters she believes them to be true.

ALBERTA SINGLETON

Sworn to and subscribed before
me this 17th day of April, 1958.

[Seal]

CHAS. N. MILLER
Notary Public

My commission expires: Sept. 18, 1961.

[fol. 5] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Habeas Corpus No. 2145

UNITED STATES OF AMERICA on the relation of ALBERTA SINGLETON, PETITIONER

v.

NINI KINSELLA, Warden of the Federal Reformatory for Women, Alderson, West Virginia

RETURN AND ANSWER—Filed Aug. 26, 1958

Comes now the respondent, Nina Kinsella, Warden, United States Federal Reformatory for Women, Alderson, West Virginia, on whom has been served a copy of a writ of habeas corpus for the production of Joanna S. Dial, and by her attorneys makes return and answer to the said writ and respectfully shows to the court that he holds the said Joanna S. Dial by authority of the United States as a prisoner pursuant to the sentence of a general court-martial under the following circumstances:

I

That the said Joanna S. Dial, a dependent wife accompanying the armed forces without the continental limits of the United States within the meaning of Article 2(11) Uniform Code of Military Justice (10 USC802(11)) was duly arraigned in a common trial with her husband, Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton) 35th Army, for the offense of involuntary manslaughter, a non-capital offense, in violation of Article 119 Uniform Code of Military Justice (10USC919) before a general court-martial convened at Bad Kreuznach, Germany, by paragraph 5, Special Orders Number 167, Headquarters 2d Armored Division, APO 42, United States Army, dated 25 July 1957. The said Joanna S. Dial and her husband,

co-accused Specialist Second Class James W. Dial, upon their pleas of guilty, were each found guilty of the offense charged. Prior to her plea of guilty, the trial defense counsel moved to dismiss the charge and specification against Joanna S. Dial on the ground that the court lacked jurisdiction to try a civilian dependent in a foreign [fol. 6] country for a non-capital offense. The law officer denied the motion. The said Joanna S. Dial was sentenced by the court-martial to be confined at hard labor for three years and her husband, Specialist Second Class James W. Dial, was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances and to be confined at hard labor for three years. On 9 September 1957, the convening authority in taking his action upon the case as required by Articles 61 and 64, Uniform Code of Military Justice (10USC861 and 864) approved the sentences in each case (Exhibit A). The record of trial was then forwarded to The Judge Advocate General, Department of the Army, who referred the record of trial to a Board of Review to determine whether the record of trial was legally sufficient to support the findings and sentences as required by Article 66, Uniform Code of Military Justice (10USC 866). The Board of Review found the findings of guilty and the sentences as to each accused correct in law and fact and affirmed them on 14 February 1958. As to her husband, Specialist Second Class Dial, final military appellate review having been completed, his sentence was ordered executed on 25 April 1958, and the Branch United States Disciplinary Barracks, Lompoc, California, was designated as the place of confinement. The Board of Review held that the court-martial had jurisdiction to try Joanna S. Dial, a civilian dependent accompanying the armed forces of the United States without the continental limits of the United States for the non-capital offense of involuntary manslaughter, in violation of Article 119, Uniform Code of Military Justice (10USC919) (Exhibit B). On 17 March 1958, The Judge Advocate General of the Army forwarded the record of trial of Joanna S. Dial and the decision of the Board of Review to the United States Court of Military Appeals for review pursuant to the provisions of Article 67b(2) (10

USC867b(2)). Under the provisions of this Article, The Judge Advocate General certified to the United States Court of Military Appeals for its consideration and action the following issue:

> Did the court-martial have jurisdiction under Article 2(11) Uniform Code of Military Justice, to try, [fol. 7] for a non-capital offense, the accused, Joanna S. Dial, a person accompanying the armed forces of the United States in Germany in peace time as the dependent wife of the accused Specialist Second Class James W. Dial?

Article 67(d), Uniform Code of Military Justice (10 USC86(d)), provides that the action to be taken by the United States Court of Military Appeals need be taken only with respect to the issues certified by the Judge Advocate General. The Judge Advocate General likewise designated three officers of the Judge Advocate General Corps to represent Joanna S. Dial and three others of the Judge Advocate General Corps to represent the United States before the United States Court of Military Appeals in the review and disposition of her case by that court. Briefs and pleadings pertaining to the jurisdictional issue presently before this court were filed and oral arguments were submitted at a hearing before the United States Court of Military Appeals on 23 June 1958. The case is presently under consideration by that court (Exhibit C). As of the date of the filing of this Return and Answer the United States Court of Military Appeals has not rendered a decision on the jurisdictional issue submitted to it by The Judge Advocate General of the Army.

II

Answering the allegations contained in the petition for writ of habeas corpus, the respondent admits, denies and alleges as follows:

1. Admits the allegation contained in paragraph 1 of the petition except the allegation that the imprisonment and detention is unlawful and specifically denies that such detention or imprisonment is unlawful.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition.

4. Denies the allegations contained in paragraph 4 of the petition and further alleges that the final arguments were submitted at a hearing before the United States Court of Military Appeals, on 23 June 1958, and that the United States Court of Military Appeals is adequately empowered under the provisions of the Uniform Code of Military Justice to grant the relief sought by the petitioner.

[fol. 8] 5. Admits the allegations contained in paragraph 5 of the petition.

III

Further answering the respondent avers:

a. That the prisoner, Joanna S. Dial, was a civilian dependent, accompanying the armed forces of the United States without the continental limits of the United States, both at the time of the offense for which she was tried by the court-martial, and at the time of her trial.

b. That the general court-martial by which the prisoner was tried and convicted for a non-capital offense had jurisdiction over the person of the prisoner and of the non-capital offense charged against her, and that the sentence adjudged against the prisoner by the court-martial was within legal limits and within the power of the court to adjudge.

c. That the prisoner Joanna S. Dial has not exhausted her remedies within the military appellate structure, in that her case has already been fully submitted for decision by the United States Court of Military Appeals on 23 June 1958, and the point now raised before this Honorable Court is being considered by the United States Court of Military Appeals and its decision is expected in the near future.

In obedience, however, to the said writ of habeas corpus the respondent herewith produces before this Honorable Court the body of the said Joanna S. Dial and for the reasons hereinbefore set forth respectfully prays

the court to discharge the said writ, dismiss the petition, and remand Joanna S. Dial to the custody of the respondent.

/s/. DUNCAN W. DOUGHERTY
United States Attorney

/s/ PERCY H. BROWN
Assistant United States Attorney

/s/ LT. COL. PETER S. WONDOLOWSKI
The Judge Advocate General's
Corps, United States Army

[fol. 9] CERTIFICATE OF SERVICE
(Omitted in printing)

• • • •

HEADQUARTERS
2D ARMORED DIVISION
APO 42 US ARMY

9 September 1957

GENERAL COURT-MARTIAL
ORDER NUMBER 35

Before a general court-martial which convened at Bad Kreuznach, Germany, pursuant to paragraph 5, Special Orders Number 167, Headquarters 2d Armored Division, APO 42, US Army, dated 25 July 1957, was arraigned and tried:

Joanna S. Dial, a person accompanying the armed forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, APO 34, US Army.

Charge: Violation of the Uniform Code of Military Justice, Article 119.

Specification: In that Joanna S. Dial, a person accompanying the armed forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, did, at Baumholder, Germany, on or about 21 May 1957, by perpetrating offenses directly affecting the person of James W. Dial, Junior, to wit: batteries during a period of several weeks immediately preceding 21 May 1957, unlawfully kill the said James W. Dial, Junior, by striking him upon the head and body with her hands, an electric extension cord, pieces of wood, and a web belt.

PLEAS

To the Charge and Specification: Guilty.

FINDINGS

Of the Specification and Charge: Guilty.

SENTENCE

To be confined at hard labor for three years. (No previous convictions considered.)

The sentence was adjudged on 29 July 1957.

ACTION OF THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION

HEADQUARTERS
2D ARMORED DIVISION
APO 42 US ARMY

9 September 1957

In the foregoing case of Joanna D. Dial, also known as Joanna S. Dial, a person accompanying the Armed Forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class James W. Dial, RA 14 233 840, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, 2d Armored Division, the sentence is approved. The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. Pending completion of appellate review, the accused will be confined in the Federal Reformatory for Women, Alderson, West Virginia.

/s/ W. Paul Johnson
/t/ W. PAUL JOHNSON
Major General, USA
Commanding

[fol. 11] GCMO #35, Hq 2d Armd Div, APO 42, US Army, dtd 9 September 57 cont

FOR THE COMMANDER:

W. M. RODGERS
Colonel, GS
Chief of Staff

OFFICIAL:

/s/ Claude E. King
CLAUDE E. KING
CWO, W-2 USA
Asst Adj Gen

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[fol. 12] GENERAL COURT-MARTIAL ORDERS No. 34

HEADQUARTERS
2D ARMORED DIVISION
APO 42 US ARMY

9 September 1957

GENERAL COURT-MARTIAL
ORDER NUMBER 34

Before a general court-martial which convened at Bad Kreuznach, Germany, pursuant to paragraph 5, Special Orders Number 167, Headquarters 2d Armored Division, APO 42, US Army, dated 25 July 1957, was arraigned and tried:

Specialist Second Class James W. Dial, RA 14 233 840, Company B, 2d Medium Tank Battalion (Patton) 35th Armor, APO 34, US Army.

Charge: Violation of the Uniform Code of Military Justice, Article 119.

Specification: In that Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, did, at Baumholder, Germany, on or about 21 May 1957, by perpetrating offenses directly affecting the person of James W. Dial, Junior, to wit: batteries during a period of several weeks immediately preceding 21 May 1957, unlawfully kill the said James W. Dial, Junior, by striking him upon the head and body with his hands, an electric extension cord, pieces of wood, and a web belt, and by striking the head of the said James W. Dial, Junior, against a crib headboard.

PLEAS

To the Specification and the Charge: Guilty.

FINDINGS

Of the Specification and Charge: Guilty.

SENTENCE

To be dishonorably discharged from the service, and to forfeit all pay and allowances, and to be confined at hard labor for three years. (No previous convictions considered.)

The sentence was adjudged 29 July 1957.

ACTION OF THE OFFICER EXERCISING COURT-MARTIAL JURISDICTION

HEADQUARTERS
2D ARMORED DIVISION
APO 42 US ARMY

9 September 1957

In the foregoing case of Specialist Second Class James W. Dial, RA 14 233 840, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, 2d Armored Division, the sentence is approved. The forfeitures shall apply to pay and allowances becoming due on and after the date of this action. The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. Pending completion of appellate review, the accused will be confined in the United States Army Branch Disciplinary Barracks, New Cumberland, Pennsylvania.

s/ W. Paul Johnson
t/ W. PAUL JOHNSON
Major General, USA
Commanding

[fol. 13] GCMO #34, Hq 2d Armd Div, APO 42, US Army, dtd 9 September 57 cont

FOR THE COMMANDER:

W. M. RODGERS
Colonel, GS
Chief of Staff

OFFICIAL:

s/ Claude E. King
CLAUDE E. KING
CWO, W-2 USA
Asst Adj Gen

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[fol. 14] GENERAL COURT-MARTIAL ORDERS No. 129

HEADQUARTERS
BRANCH UNITED STATES DISCIPLINARY BARRACKS
Lompoc, California

25 April 1958

GENERAL COURT-MARTIAL
ORDER NUMBER 129

In the general court-martial case of Specialist Second Class James W. Dial, RA 14 233 840, United States Army, Company B, 2d Medium Tank Battalion (Patton) 35th Armor, APO 34, US Army (presently confined Branch United States Disciplinary Barracks, Lompoc, California), the sentence to dishonorable discharge, forfeiture of all pay and allowances becoming due on and after the date of the action of the convening authority and confinement at hard labor for three years, adjudged 29 July 1957, and as promulgated in General Court-Martial Order Number 34, Headquarters 2d Armored Division, APO 42, US Army, dated 9 September 1957 has been affirmed pursuant to the Uniform Code of Military Justice, Article 66. The provisions of the Uniform Code of Military Justice, Article 71c, having been complied with, the sentence will be duly executed; but the execution of that portion thereof adjudging dishonorable discharge is suspended until the accused's release from confinement. The prisoner will be confined in the Branch United States Disciplinary Barracks, Lompoc, California, and the confinement will be served therein, or elsewhere as competent authority may direct. (CM 397520)

BY ORDER OF COLONEL COX:

H. J. BLAKELY
Captain, AGC
Adjutant

OFFICIAL:

/s/ Ralph Herrod
RALPH HERROD
Lt Col, JAGC
Asst Adjutant

DISTRIBUTION:
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R/N 19662

[fol. 15] DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

In the Board of Review, United States Army

Before

BISANT, SCOTT and BLACKMARR
Members

---

14 February 1958

CM 397520

UNITED STATES

v.

JOANNA S. DIAL, a person accompanying the armed forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class JAMES W. DIAL, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, APO 34, and Specialist Second Class JAMES W. DIAL, RA 14 233 840, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, APO 34

JOANNA S. DIAL, APPELLANT

2D ARMORED DIVISION

Sentences adjudged 29 July 1957

Approved sentences: JOANNA S. DIAL: Confinement at hard labor for three (3) years. Sp2 JAMES W. DIAL: Dishonorable discharge, total forfeitures, and confinement at hard labor for three (3) years.

Appellate Counsel for the Accused:
1st Lt. Lawrence R. Fullem, JAGC

Appellate Counsel for the United States:
1st Lt. William H. Keniry, JAGC

The Judge Advocate General has certified this case to the USCMA for review under UCMJ, Art. 67 (b)(2).

DECISION—Feb. 14, 1958

On 29 July 1957, before a general court-martial convened at Bad Kreuznach, Germany, Specialist Second Class James W. Dial and the appellant, Joanna S. Dial, his wife, pleaded guilty to and were convicted of involuntary manslaughter of James W. Dial, Junior, (a dependent child of the accused), in violation of the Uniform Code of Military Justice, Article 119. At all times Joanna S. Dial was a person accompanying the armed [fol. 16] forces of the United States without the continental limits of the United States (Pros. Ex. 1). The court sentenced the accused, Specialist Dial, to dishonorable discharge, total forfeitures, and confinement at hard labor for three years and the accused, Joanna S. Dial, to confinement at hard labor for three years. The respective sentences were approved by the convening authority who directed that pending completion of appellate review the accused Specialist Dial, be confined in the United States Army Branch Disciplinary Barracks, New Cumberland, Pennsylvania, and that the accused, Joanna Dial, be confined in the Federal Reformatory for Women, Alderson, West Virginia, and forwarded the record of trial to The Judge Advocate General of the Army for review by a board of review. Pursuant to Joanna Dial's request, The Judge Advocate General designated counsel to represent her before the Board of Review. The accused Specialist Dial waived his right to appellate representation.

Appellate defense counsel has assigned the following error:

THE COURT-MARTIAL DID NOT HAVE JURISDICTION OVER THE ACCUSED.

Previous to pleading, the trial defense counsel moved to dismiss the charge and specification on the ground that the court-martial lacked jurisdiction to try Joanna S. Dial on a charge of this nature. The motion was denied (R. 10). Against this background the constitutional question that confronts us is whether the civilian

dependent of an American serviceman may be tried by court-martial in a foreign country for a non-capital offense committed in that country.

Appellant was tried by court-martial which asserted jurisdiction under Article 2(11) of the Code which provides:

> "The following persons are subject to this code:
>
> • • • •
>
> "Subject to the provision of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

[fol. 17] Relevant to a determination whether the trial of the appellant was constitutionally permissible are the following provisions of the Constitution:

Article III § 2 prescribes that:

> • • • •
>
> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed."

The Fifth Amendment states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

And the Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Integrally involved in our consideration of the foregoing provisions are Article I § 8, clause 14, the "Necessary and Proper Clause," which empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," and clause 18 which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers."

[fol. 18] As the keystone authority in support of his contention that the court-martial did not have jurisdiction over the accused, appellate defense counsel relies upon the recent decision of the United States Supreme Court in the consolidated cases of *Reid* v. *Covert* (701) and *Kinsella* v. *Krueger* (713), 354 U.S. 1, 77 S. Ct. 1222 (1957).[1] Originally the court-martial jurisdiction

[1] Mrs. Clarice Covert, dependent wife of an airman, killed her husband on an airbase in England. She was convicted by a court-martial for murder in violation of Article 118 of the Code. The *Krueger* case arose out of the premeditated murder of Colonel Aubrey D. Smith by his dependent wife, Dorothy K. Smith, on a U. S. Army base in Japan. She was convicted of murder in violation of Article 118 of the Code and sentenced to life imprisonment. The findings and sentences were approved by the convening authority and subsequently affirmed by a board of review (10 CMR 350, 13 CMR 307) and the United States Court of Military Appeals (5 USCMA 314).

was upheld by the United States Supreme Court in the cases of *Kinsella* v. *Krueger*, 351 U.S. 470, and *Reid* v. *Covert*, 351 U.S. 487. Subsequently, however, the Court granted a petition for rehearing (352 U.S. 901), and, after further argument and reconsideration held that in capital cases the exercise in time of peace of court-martial jurisdiction over civilian dependents could not be justified by Article I, considered in connection with the specific protections of Article III and the Fifth and Sixth Amendments. Implicit in Mr. Justice Black's opinion (in which The Chief Justice, Mr. Justice Douglas, and Mr. Justice Brennan join in holding that Article 2(11), supra, is unconstitutional) is the rationale that the constitutional provisions apply everywhere the Government of the United States acts with respect to its citizens; that the power conferred upon Congress by Article I § 8, clause 14, as supplemented by the "Necessary and Proper Clause" does not authorize the making of civilians amenable to court-martial jurisdiction; and Article 2(11) denying civilians trial by jury overseas is therefore violative of Article III and the Fifth and Sixth Amendments.

A crucial aspect of the latest decisions in the *Covert* and *Krueger* cases is the narrow delineation of the issue on which the opinions of the majority actually converge in striking down the court-martial jurisdiction, viz., the validity of the trial by courts-martial of civilian dependents in a capital case in time of peace. Four of the justices in concurring unconditionally apparently would extend the holding to encompass non-capital cases. Two dissented, and one did not participate. In such a setting the modificatory remarks in the concurring opinions of Mr. Justice Frankfurter and Mr. Justice Harlan have particular significance in the application of that precedent to the case at bar.

[fol. 19] Although appellant has cited Mr. Justice Frankfurter's remarks which indicate he did not intend to imply "that the considerations that are controlling in capital cases involving civilian dependents are constitutionally irrelevant in capital cases involving civilians other than dependents or in *non-capital cases involving dependents* or other civilians," this caveat is preceded and followed by repeated references to the capital offense aspect

of the case. Thus Mr. Justice Frankfurter in his concurring opinion states:

> ". . . In making this adjudication I must emphasize that it is only the trial of civilian dependents *in a capital case* in time of peace that is in question. The Court has not before it, and therefore I need not intimate any opinion, on situations involving civilians, in the sense of persons not having a military status, other than dependents. Nor do we have before us a case involving a non-capital crime. . . :
>
> * * * *
>
> ". . . These cases involve the validity of procedural conditions for determining the *commission of a crime in fact punishable by death.* The taking of life is irrevocable. *It is in capital cases especially* that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid* v. *Covert, supra,* at pp. 45-46; emphasis added.

Concurring on a much narrower basis, Mr. Justice Harlan delineates to capital offenses his denial of courts-martial jurisdiction over civilian dependents overseas. In this connection he states:

> "On this basis, I cannot agree with the sweeping proposition that a full Article III trial, with indictment and trial by jury, *is required in every case* for the trial of a civilian dependent of a serviceman overseas. . . . Again, I need not go into details, beyond stating that except for capital offenses, such as we have here, to which, in my opinion, special considerations apply, I am by no means ready to say that Congress' power to provide for trial by court-martial of civilian dependents overseas is limited by Article III and the Fifth and Sixth Amendments. Where, if at all, the dividing line should be drawn among *cases not capital* need not now be decided. We are confronted here with capital offenses alone: *and it seems to me particularly unwise now to decide more than we have to. . . .*" *Reid* v. *Covert, supra,* at pp. 75-77; emphasis added.

[fol. 20] On the premise of the foregoing observations we believe that the cited precedents establish that the trial by courts-martial of civilian dependents in time of peace is unconstitutional only with respect to capital offenses. In summary, after weighing all of the considerations implicit in the decision of the Court in the *Covert* and *Krueger* cases, *supra*, we conclude that the necessity for military jurisdiction over dependents charged with non-capital offenses is sufficient to overcome the requirements of Article III and the Fifth and Sixth Amendments.

Accordingly, the Board of Review having found the approved findings of guilty and the sentence as to each accused correct in law and fact and having determined on the basis of the entire record that they should be approved, such findings of guilty and sentence as to each accused are hereby affirmed.

/s/ Oscar M. Bisant, Jr.

/s/ James J. Scott

/s/ W. H. Blackmarr

[fols. 21-22] * * *

[fol. 25] IN THE UNITED STATES
COURT OF MILITARY APPEALS

UNITED STATES, APPELLEE

v.

JOANNA S. DIAL, a person accompanying the armed forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class JAMES W. DIAL, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, APO 34, and Specialist Second Class JAMES W. DIAL (RA 14233840), Company B, 2d Medium Tank Battalion (Patton), 35th Armor, APO 34

JOANNA S. DIAL, APPELLANT

CERTIFICATE FOR REVIEW

Board of Review No. 397520

Docket No. .....

To the Honorable, The Judges of the United States Court of Military Appeals:

1. Pursuant to the Uniform Code of Military Justice, Article 67(*b*)(2), the record of trial and the decision of the board of review, United States Army, in the above-entitled case, are forwarded for review.

2. The accused, Joanna S. Dial, was tried and convicted by general court-martial at Bad Kreuznach, Germany, on 29 July 1957 for a violation of the Uniform Code of Military Justice, Article 119. She was sentenced to be confined at hard labor for three years. The sentence was approved by the convening authority and was affirmed by a board of review on the 14th day of February 1958.

3. It is requested that action be taken with respect to the following issue:

DID THE COURT-MARTIAL HAVE JURISDICTION UNDER ARTICLE 2(11), UNIFORM CODE

OF MILITARY JUSTICE, TO TRY, FOR A NON-CAPITAL OFFENSE, THE ACCUSED, JOANNA S. DIAL, A PERSON ACCOMPANYING THE ARMED FORCES OF THE UNITED STATES [fol. 24] IN GERMANY IN PEACETIME AS THE DEPENDENT WIFE OF THE ACCUSED, SPECIALIST SECOND CLASS JAMES W. DIAL?

MAR 7 1958

/s/ George W. Hickman, Jr.
GEORGE W. HICKMAN, JR.
Major General, USA
The Judge Advocate General

Received a copy of the foregoing Certificate for Review this 17 day of March, 1958.

/s/ Jasper L. Searles
JASPER L. SEARLES by JGL
Colonel, JAGC
Office of The Judge Advocate General, U. S. Army
Appellate Government Counsel

/s/ Thomas J. Nichols
THOMAS J. NICHOLS
Major, JAGC
Office of The Judge Advocate General, U. S. Army
Appellate Government Counsel

/s/ John G. Lee
JOHN G. LEE
Lieutenant Colonel, JAGC
Office of The Judge Advocate General, U. S. Army
Appellate Government Counsel

/s/ William H. Keniry
WILLIAM H. KENIRY
First Lieutenant, JAGC
Office of The Judge Advocate General, U. S. Army
Appellate Government Counsel

[fol. 25] /s/ James Garnett
JAMES GARNETT
Colonel, JAGC
Office of The Judge Advocate
General, U. S. Army
Appellate Defense Counsel

/s/ Lawrence R. Fullem
LAWRENCE R. FULLEM
First Lieutenant, JAGC
Office of The Judge Advocate
General, U. S. Army
Appellate Defense Counsel

/s/ John F. Christensen
JOHN F. CHRISTENSEN
Captain, JAGC
Office of The Judge Advocate
General, U. S. Army
Appellate Defense Counsel

[fol. 26] U. S. ARMY HOSPITAL NEUBRUCKE
NEUROPSYCHIATRIC SECTION
APO 34 US ARMY

3 July 1957

RE: Mrs. Joanna DIAL, dependent wife of SP-2 James W. DIAL, RA 14 233 040, Co "B", 29th Tank Bn, APO 34, US Army.

CERTIFICATE

1. This is to certify that the above captioned individual has been psychiatrically evaluated on 25th and 27th June 1957 and on the 2d of July 1957. This evaluation was made upon the request of the Commanding Officer of Co "B", 29th Tank Bn, APO 34, US Army, in connection with the death of one of the accused's children who died on the 21st of May 1957.

2. Family and personal history reveal that the accused was born at Shelton, S. C. The father was a shoemaker, there were seven children and the economic conditions were not too good. The parents separated in 1949 and around the same time the accused quit school because she expected an illegitimate child. She has then lived first with her father and later with her mother. At times she worked, apparently without proper training, as a nurse in private homes. She married her present husband in 1954.

3. Concerning her marital life and the circumstances surrounding the death of the child, she essentially confirms the information gained from her husband, although she is much more cautious trying rather hard to cover up. She feels that her marital life is a happy one. She has no particular complaints about her husband and believes that she has been a good mother. She found it rather funny that I thought a monthly food bill of $30 seemed quite small for the size of her family and she assured me laughingly that it was very easy to satisfy everybody with her way of cooking.

4. She explained that the child in question had always been difficult to bring up. It had a bad temper, would cry much throughout the night and present a feed-

ing problem. After the birth of the last baby, however, this situation became much worse and the child would not eat at all, would have fits of temper and would not tolerate the mother to come near him. She emphatically denied that she ever beat the child herself, claiming that the husband caused all the various injuries found on the child. The husband, however, says that the mother too beat the child. In addition she claims that she actually seldom saw the beatings and got to know of them only afterwards. For example, she said that her husband did beat the oldest child the night before the baby died. She, however, "saw the scars only the next morning". [fol. 27] She knows and admits that a belt as well as a wooden plank were used to beat the children. She admits that she never did anything to prevent the beatings and that she never called for help or medical care when she saw that the children had open wounds or presented such grave problems as the now dead child did. She herself feels that it is quite natural to beat children since she got used to it in her own childhood. She claims that she did not like the beatings by her father but that at least she learned her lesson. She pretends that she did not notice any particular change in this child before it died since it had been so difficult for a long time. Although she seemed rather glad and satisfied that lately the child stopped crying so much and would only get up on all four and rock back and forth.

5. The accused felt quite indignant that she had to undergo psychiatric examination because she was quite sure that there was never anything wrong with her mentally. She leaves no doubt that she knew and knows exactly what was going on and what she herself was doing at all times. She also assured me that this is and was true also for her husband.

6. Psychometric tests showed that the accused reached an I.Q. of 90 on the Wechsler-Bellevue Intelligence Scale which places her on the border line of low average and dull normal intelligence. Her performance on other tests showed a certain sloppiness and rather poor control over her emotions. Her interpersonal relations appeared to be somewhat superficial, and her intellectual and emotional

horizon limited, however, considering her social and educational background these findings were still within the limits of normality.

7. Throughout the various interviews the accused was fairly cooperative but definitely trying to cover up and reluctant to give information. Her thought processes were normal and her emotional responses essentially adequate, although at times her behavior seemed to be rather calculated and aimed to give the impression that she was very much concerned over the death of her child. On the other hand, when she believed herself unobserved, she appeared quite relaxed, joking and totally unconcerned. Only during the last interview did she seem to be dimly aware of the seriousness of her situation.

8. Diagnostic impression: Emotional instability reaction (Immaturity reaction), with marked hostility in a rather primitive restricted and egocentric person of low average intelligence, and of poor social educational background.

9. The accused at the time of the alleged offense was so far free from mental disease, defect, or derangement as to be able, concerning the particular acts charges, to distinguish right from wrong.

[fol. 28] 10. The accused at the time of the alleged offense was so far free from mental defect, disease, or derangement as to be able, concerning the particular acts charged, to adhere to the right.

11. The accused does possess sufficient mental capacity to understand the nature of the proceedings against her and intelligently to conduct or cooperate in her defense.

s/ Felix Von Mendelssohn
FELIX VON MENDELSSOHN
Major MC
Chief, Neuropsychiatric Section

[fol. 29]

PROCEEDINGS OF A GENERAL COURT-MARTIAL

which met (at) Bad Kreuznach, Germany, at 1011 hours, 29 July 1957, pursuant to the following orders:

SPECIAL ORDERS No. 167

HEADQUARTERS
2D ARMORED DIVISION
APO 42 US ARMY

25 July 1957

SPECIAL ORDERS
NUMBER 167

EXTRACT

5. A general court-martial is hereby ordered to convene at Bad Kreuznach, Germany, at 1000 hours, 29 July 1957, or as soon thereafter as practicable, for the trial of Specialist Second Class James W. Dial, RA 14 233 840, Company B, 2d Medium Tank Battalion (Patton) 35th Armor, formerly Company B, 29th Tank Battalion, and Joanna S. Dial, a person accompanying the armed forces of the United States without the continental limits of the United States, *onla*. The court will be constituted as follows:

• • • •

FOR THE COMMANDER:

W. M. ROGERS
Colonel, GS
Chief of Staff

OFFICIAL:

s Claude E. King
CLAUDE E. KING
CWO, W-2 USA
Asst Adj Gen

DISTRIBUTION:

"E" 40—SJA

• • • •

PRESIDENT: The court will come to order.

TRIAL COUNSEL: This court is convened by paragraph 5, Special Orders Number 167, this headquarters, dated 25 July 1957, a copy of which has been furnished to the law officer, each member of the court, counsel, the accused, and to the reporter for insertion in the record.

The following persons named in the appointing orders are present:

LT COL JOSEPH L CHALK (Law Officer)
Court Members

LT COL JACK R METZDORF
LT COL JOSEPH E SHEPARD
MAJ LINTON H EVANS JR
MAJ JOSE M MARTINEZ
MAJ WILLIAM E STRUBEL
MAJ HAROLD F KNAPP
CAPT JOHN W BAKER
CAPT ROMA J McDOWELL
1ST LT JAMES H THAYER
2D LT HARRY W JOHNSON

1ST LT FRANCIS R BUCKLEY (Trial Counsel)
1ST LT ARNOLD H LOZOWICK (Defense Counsel)

No person named in the appointing orders is absent.

TRIAL COUNSEL: The prosecution is ready to proceed with the trial in the case of the United States against Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, who is present in the court; and the case of Mrs. Joanna S. Dial, a person accompanying the United States armed forces without the continental limits of the United States as dependent wife of the accused Specialist Second Class James W. Dial, who is also in the court.

TRIAL COUNSEL: Mr. Edward Gans has been appointed reporter for this court and will now be sworn.

(The appointed reporter, Edward Gans, was then duly sworn.)

TRIAL COUNSEL: The legal qualifications of all members of the prosecution are correctly stated in the appointing orders.

TRIAL COUNSEL: No member of the prosecution named in the appointing orders has acted as investigating officer, law officer, court member, or as a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceedings involving the same general matter.

[fol. 31] TRIAL COUNSEL: By whom will the accused be defended?

DEFENSE: The accused, Specialist Second Class James Dial will be defended by 1st Lieutenant Lozowick, the appointed defense counsel. The accused, Joanna S. Dial has requested that Lieutenant Robert Funk represent her as individual counsel. He has been made available by the convening authority.

TRIAL COUNSEL: And Lieutenant Funk is now present in the court?

DEFENSE: Yes, sir.

TRIAL COUNSEL: And you will represent Mrs. Dial, Lieutenant Funk?

INDIVIDUAL COUNSEL: Yes, sir.

TRIAL COUNSEL: Will counsel representing the accused state whether the legal qualifications of the appointed members of the defense are other than as stated in the appointing orders; and will individual counsel state whether he has been certified as counsel by the appropriate Judge Advocate General?

DEFENSE: The qualifications of the appointed defense counsel are correct as stated in the appointing orders.

INDIVIDUAL COUNSEL: I am an officer of the Judge Advocate General Corps. I have been certified as counsel and have the legal qualifications as enumerated in Article 27b (1), PCMJ.

LAW OFFICER: Before you go any further, I would like to ask one question, Lieutenant Lozowick. You are also representing Mrs. Dial, is that right? You are appointed counsel for both accused.

DEFENSE: I was appointed counsel for both of them, sir. When the request for Lieutenant Funk was proc-

essed, I then no longer represented her, but represented the interests of Specialist Dial, and Lieutenant Funk represented her interests. This was to avoid any possible conflict of interests. I have not represented her since that date.

LAW OFFICER: But you are originally the appointed counsel for both.

DEFENSE: That is correct.

LAW OFFICER: Was it her desire that once she obtained the services of the requested counsel, that you should no longer serve her as defense counsel?

DEFENSE: Yes, sir.

LAW OFFICER: Is that her wish?

DEFENSE: Yes, sir.

[fol. 32] LAW OFFICER: In other words, she is dispensing with your services as far as the trial is concerned, but you were appointed trial counsel for her originally, is that correct?

DEFENSE: That is correct.

LAW OFFICER: All right; proceed.

TRIAL COUNSEL: Has any member of the defense, or individual counsel, acted as the accuser, a member of the prosecution, investigating officer, law officer, or member of the court in this case?

DEFENSE: No member of the defense has so acted.

TRIAL COUNSEL: Has individual counsel so acted?

INDIVIDUAL COUNSEL: No, sir.

LAW OFFICER: It appears that counsel for both sides have the requisite qualifications.

LAW OFFICER: Now, has the accused Specialist Dial made a request in writing that the membership of this court be composed of enlisted persons?

TRIAL COUNSEL: He has not made such a request.

LAW OFFICER: Have you fully explained that right to him?

DEFENSE: Yes, sir.

LAW OFFICER: And you are satisfied that he understood that right, and it is his desire that there not be enlisted members on the court.

DEFENSE: That is correct.

LAW OFFICER: All right, proceed to convene the court.

TRIAL COUNSEL: The court will be sworn.

(The members of the court, the law officer, personnel of the prosecution and defense were then duly sworn.)

LAW OFFICER: The court is now convened.

TRIAL COUNSEL: The general nature of the charges in this case is that each accused is charged with involuntary manslaughter in violation of Article 119 of the Uniform Code of Military Justice. The charges were preferred by Captain Noel D. Knotts, forwarded with recommendations as to disposition by Lieutenant Colonel Glenn W. Zarger and Colonel Rudolph Barlow, and investigated by Major George I. Whitmore.

TRIAL COUNSEL: Neither the law officer nor any member of the court will be a witness for the prose-u- [fol. 33] tion. If any member of the court is aware of any facts which he believes may be a ground for challenge by either side against him, he should now state such facts.

LAW OFFICER: Apparently there are none; and that extends to the law officer, too. You did not include me in your statement, but I will so consider it.

TRIAL COUNSEL: The prosecution has no challenge for cause. The prosecution has no peremptory challenge.

TRIAL COUNSEL: Does the accused wish to challenge any member of the court or the law officer for cause?

DEFENSE: The accused, Specialist Second Class James W. Dial, does not desire to challenge any member of the court or law officer for cause.

INDIVIDUAL COUNSEL: The accused, Joanna S. Dial, does not desire to challenge any member of the court or the law officer for cause.

TRIAL COUNSEL: Does the accused Specialist Second Class Dial wish to exercise his right to a peremptory challenge against any member?

DEFENSE: He does not.

TRIAL COUNSEL: Does the accused Joanna S. Dial wish to exercise her right to one peremptory challenge?

INDIVIDUAL COUNSEL: She does not.

TRIAL COUNSEL: The charges have been properly referred to this court for trial. With the consent of the

accused, I shall omit the reading of the charges, a copy of which is before each member of the court, the law officer and the accused. The charges have been signed by Captain Noel D. Knotts, a person subject to the code, as accuser; are properly sworn to before an officer of the armed forces authorized to administer oaths, and this is true in connection with each accused; and are properly referred to this court for trial by Major General W. Paul Johnson, the convening authority, with instructions that these cases be tried in common trial.

The charges and specifications, the name and description of the accuser, his affidavits, and the references for trial will be copied verbatim into the record.

DEFENSE: The accused consents.

INDIVIDUAL COUNSEL: The accused, Joanna S. Dial, consents.

LAW OFFICER: The court will waive reading of the charges.

[fol. 34] ARRAIGNMENT

As to James W. Dial, Specialist Second Class:

CHARGE: Violation of the Uniform Code of Military Justice, Article 119.

Specification: In that Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, did, at Baumholder, Germany, on or about 21 May 1957, by perpetrating offenses directly affecting the person of James W. Dial, Junior, to wit: batteries during a period of several weeks immediately preceding 21 May 1957, unlawfully kill the said James W. Dial, Junior, by striking him upon the head and body with his hands, an electric extension cord, pieces of wood, and a web belt, and by striking the head of the said James W. Dial, Junior, against a crib headboard.

[fol. 35] As to Specialist Second Class James W. Dial.

Typed Signature of Accuser:

/s/ Noel D. Knotts
/t/ Noel D. Knotts

Rank:
Captain, Armor

Organization:
Company "B", 29th Tank Bn, APO 34, US Army

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 29th day of June, 1957, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

/s/ William W. Miller (Typed signature)

2d Lt, Headquarters 29th Tank Bn (Rank and organization of officer administering oath)

Officer administering oath must be a commissioned officer.

Adjutant (Official character, as Adjutant, Summary Court, etc. See paragraph 29*c*, MCM, 1951, and articles 30*a* and 136.)

1ST INDORSEMENT

Headquarters 2d Armored Division (Designation of command of convening authority)

APO 42, US Army (Place)

26 July 1957 (Date)

Referred for trial to the General court-martial appointed by Paragraph 5 Special Orders Number 167, Headquarters 2d Armored Division, APO 42, US Army dated, 25 July 1957, subject to the following instructions: to be tried in a common trial with Joanna S. Dial, a person accompanying the armed forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class James W. Dial.

By—For the Commander—of .....(Command or order)

s/ Claude E. King /t/ CLAUDE E. KING
CWO, W-2 USA
Asst Adj Gen

(Typed signature, rank, and official capacity of officer signing)

This page will follow the charges and specifications which are to be copied verbatim into the record at the point indicated in the sidenote "Arraignment" at page 507, MCM, 1951.

[fol. 36] ARRAIGNMENT

As to Joanna S. Dial, Dependent Wife:

CHARGE: Violation of the Uniform Code of Military Justice, Article 119.

Specification: In that Joanna S. Dial, a person accompanying the armed forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, did, at Baumholder, Germany, on or about 21 May 1957, by perpetrating offenses directly affecting the person of James W. Dial, Junior, to wit: batteries during a period of several weeks immediately preceding 21 May 1957, unlawfully kill the said James W. Dial, Junior, by strik-

ing him upon the head and body with her hands, an electric extension cord, pieces of wood, and a web belt.

[fol. 37] As to Dependent Wife Joanna S. Dial.

/s/ Noel D. Knotts
/t/ Noel D. Knotts

(Typed Signature of Accuser)

Captain, Armor (Rank)

Company "B", 29th Tank Bn, APO 34, US Army (Organization)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 29th day of June, 1957, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

/s/ William W. Miller (Typed signature)

2d Lt, Headquarters 29th Tank Bn (Rank and organization of officer administering oath)

Officer administering oath must be a commissioned officer.

Adjutant (Official character, as Adjutant, Summary Court, etc. See paragraph 29c, MCM, 1951, and articles 30a and 136.)

1ST INDORSEMENT

Headquarters 2d Armored Division (Designation of command of convening authority)

APO 42, US Army (Place)

26 July 1957 (Date)

Referred for trial to the General court-martial appointed by paragraph 5 Special Orders Number 167, Headquarters 2d Armored Division, APO 42, US Army dated, 25 July 1957, subject to the following instructions: to be tried in a common trial with Specialist Second Class James W. Dial, RA 14 233 840, Company B, 2d Medium Tank Battalion, 35th Armor.
Command or order:

By—For the Commander—of.....(Command or order)

/s/ Claude E. King /t/ Claude E. King
CWO, W-2 USA
Asst Adj Gen

(Typed signature, rank, and official capacity of officer signing)

This page will follow the charges and specifications which are to be copied verbatim into the record at the point indicated in the sidenote "Arraignment" at page 507, MCM, 1951.

[fol. 38] TRIAL COUNSEL: The charges were served on each accused by me on 12 July 1957.

TRIAL COUNSEL: Specialist Second Class Dial, how do you plead? Before receiving your pleas, I advise you that any motions to dismiss any charge or to grant other relief should be made at this time.

DEFENSE: The accused Specialist Second Class James W. Dial pleads:

To the Specification and the Charge: Guilty.

TRIAL COUNSEL: Joanna S. Dial, how do you plead? Before receiving your pleas, I advise you that any motions to dismiss any charges or to grant other relief should be made at this time.

INDIVIDUAL COUNSEL: Sir, I move that the charges against the defendant, Joanna S. Dial, be dismissed on the ground that the court-martial has no jurisdiction over the person of a civilian for trial on charges of this nature.

LAW OFFICER: Do you have any argument in support of your move?

INDIVIDUAL COUNSEL: No, sir.

LAW OFFICER: Is there any rebuttal by the trial counsel?

TRIAL COUNSEL: No, sir.

LAW OFFICER: The motion is denied.

INDIVIDUAL COUNSEL: The accused Joanna S. Dial pleads:

To the Charge and Specification: Guilty.

LAW OFFICER: At this time I would like to ask the members of the court to withdraw so that the law officer, counsel for both sides, the accused and the reporter can enter into a closed session out of the hearing of the court.

(The court then recessed at 1023 hours, 29 July 1957, until 1032 hours, 29 July 1957, during which time an out-of-court hearing was held, attended by the law officer, counsel for both sides, both accused, and the reporter.)

PRESIDENT: The court will come to order.

TRIAL COUNSEL: All parties to the trial who were present when the court recessed are again present.

LAW OFFICER: Let the record reflect that during the absence of the members of the court an out-of-court hearing was conducted between the parties to the trial, the two accused, and the reporter and law officer; that the out-of-court hearing will be recorded and made a [fol. 39] part of this record as an appellate exhibit, Appellate Exhibit 3.

LAW OFFICER: One statement for the record: the court has accepted the plea of guilty of each accused.

You may proceed.

TRIAL COUNSEL: The prosecution has no legal authorities to present to the court. Does the defense desire to present legal authorities at this time?

DEFENSE: The defense does not.

TRIAL COUNSEL: The prosecution has no opening statement. The prosecution rests.

DEFENSE: The accused Specialist Dial's rights to testify as a witness on the merits have been explained to him by me, and he does not desire to so testify. The defense rests as to Specialist Dial.

LAW OFFICER: Before you go further, are you satisfied that he understands his rights in that regard?

DEFENSE: Yes, sir, I am.

LAW OFFICER: You do not, then, desire me to instruct him any further in that regard.

DEFENSE: I don't think it will be necessary.

INDIVIDUAL COUNSEL: Accused Joanna S. Dial's rights to testify in her own behalf have been explained to her, and she does not desire to take the stand at this time. The defense rests as to Joanna Dial.

LAW OFFICER: You are satisfied that she understands her rights as a witness?

INDIVIDUAL COUNSEL: I am.

LAW OFFICER: And you do not desire me to instruct her further.

INDIVIDUAL COUNSEL: No, sir.

TRIAL COUNSEL: The prosecution has no further evidence to offer. Does the defense have any further evidence to offer?

DEFENSE: The defense does not.

TRIAL COUNSEL: Does the court wish to have any witnesses called?

PRESIDENT: The court does not.

[fol. 40] TRIAL COUNSEL: The prosecution waives argument.

DEFENSE: The defense waives argument.

LAW OFFICER: Has the prosecution anything further?

TRIAL COUNSEL: No, sir.

LAW OFFICER: Does the defense have anything further?

DEFENSE: No, sir.

LAW OFFICER: The court is instructed that a plea of guilty standing before the court is a complete confession of guilt of the offense to which the plea relates and justifies a finding of guilty of such offense. A plea of guilty admits each and every element of the offense to which it relates, and, as to such offense, removes the presumption of innocence, eliminates the requirement that the Government establish its case beyond a reasonable doubt, and does away with the necessity of offering proof to sustain the degree of guilt.

In this case each of the accused has entered a plea of guilty to the specification and charge, which plea still stands. Consequently, no further issue as to the guilt or innocence of either of the accused as to this offense remains to be resolved. However, under the code, you are required to make findings in closed session as to all charges and specifications regardless of whether the accused has pleaded guilty or not guilty thereto.

I might state that the findings should be arrived at separately as to each accused. They are on trial here today as individuals. The findings should be announced as to each accused separately.

Are there any questions by the court members?

PRESIDENT: Apparently there are none.

LAW OFFICER: The court will be closed.

(The court then closed at 1027 hours, 29 July 1957, until 1043 hours, 29 July 1957.)

PRESIDENT: The court will come to order.

TRIAL COUNSEL: All parties to the trial who were present when the court closed are again present.

LAW OFFICER: I would like the record to reflect that prior to the closing of the court all manuals were taken from the members of the court, and that during their deliberations in closed session, they were not in possession of manuals.

[fol. 41] FINDINGS

PRESIDENT: Specialist Second Class James W. Dial, it is my duty as president of this court to inform you that the court, in closed session and upon secret written ballot, all of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

Of the Specification and Charge: GUILTY.

PRESIDENT: Mrs. Joanna S. Dial, it is my duty as president of this court to inform you that the court, in closed session, upon secret written ballot, all of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

Of the Specification and Charge: GUILTY.

LAW OFFICER: The court will now hear the personal data concerning the accused shown on the charge

sheet, and will receive evidence of previous convictions if any.

TRIAL COUNSEL: The charge sheet in the case of James W. Dial shows the following information concerning the accused:

Accused: Dial, James W.
Service Number: RA 14 233 840
Grade: Specialist Second Class
Date of Birth: 12 November 1928
Organization and Armed Force: Company "B", 29th Tank Battalion, APO 34, US Army
Contribution to Family or Quarters Allowance: None
Pay Per Month: Basic: $210.60; *Foreign Duty:* 16.00; *Total:* 226.60
Initial Date of Current Service: 8 March 1954
Term of Current Service: Six (6) years
Prior Service: 1: Seven (7) years and twenty (20) days; 2. DATE ARRIVED IN USAREUR: 23 October 1954
Data as to Restraint: Arrest of Quarters, 23 May 1957, Building Nr. 8303, Harold D. Smith Barracks, Baumholder, Germany

Are these data correct?

DEFENSE: Yes, they are.

TRIAL COUNSEL: The charge sheet as to Joanna S. Dial shows the following information: "Dial, Joanna S.; Passport Number 102 142; Dependent Wife; Date of [fol. 42] Birth, 31 December 1934; Description: The accused is a civilian accompanying the armed forces in Germany as the dependent wife of Specialist Second Class James W. Dial." Of course, there is no information on pay per month, and there is no information as to data as to any restraint.

Are these data correct?

INDIVIDUAL COUNSEL: They are.

TRIAL COUNSEL: I have evidence of no previous convictions as to either of the accused.

TRIAL COUNSEL: Request the reporter mark this document, consisting of two pages and four photographs which are incorporated by reference and numbered 1a, 1b, 1c and 1d, the photographs being so numbered, be marked as one exhibit, Prosecution Exhibit 1 for identification.

(Reporter complies)

TRIAL COUNSEL: The record should note that I have handed Prosecution Exhibit 1 for identification to regularly appointed defense counsel.

(Document tendered)

TRIAL COUNSEL: Let the record also note that after it has been perused, I now show it to the individual counsel for Mrs. Dial.

(Document tendered)

TRIAL COUNSEL: Prosecution offers in evidence as Prosecution Exhibit 1, Prosecution Exhibit 1 for identification, a stipulation consisting of two pages and four photographs which are incorporated by reference, the photographs being numbered 1a, 1b, 1c and 1d.

LAW OFFICER: The exhibit will be received and marked as requested. You may read it if you desire.

(The trial counsel then read the stipulation to the court, same being appended to the record of trial as Prosecution Exhibit 1.)

TRIAL COUNSEL: I might add that the photographs referred to are attached to and are part of this exhibit.

TRIAL COUNSEL: The prosecution has nothing further.

DEFENSE: The defense would request that Specialist Dial be instructed as to his rights to present evidence in mitigation and extenuation.

LAW OFFICER: Specialist Dial, you are advised that you may now present evidence in extenuation and mitigation of the offense of which you stand convicted. You may, if you wish, testify under oath as to such matters, or you may remain silent, in which case the court will not draw any inferences from your silence. In addition, you may, if you wish, make an unsworn statement in mitigation or extenuation of the offense of which you stand convicted. This unsworn statement is not evidence, and you cannot be cross-examined upon it, but the [fol. 43] prosecution may offer evidence to rebut anything contained in the statement. The statement may be oral or in writing, or both. You may make it yourself, or it may be made by your counsel, or by both of you. Consult with your counsel and advise the court what you desire to do.

(Accused confers with counsel)

ACCUSED SPECIALIST DIAL: Sir, I do not desire to present any evidence. I do not desire to make any more evidence to what already exists.

INDIVIDUAL COUNSEL: Sir, I request that the defendant Joanna S. Dial be advised of her rights to present evidence in extenuation and mitigation.

LAW OFFICER: Mrs. Dial, you are advised that you may now present evidence in extenuation or mitigation of the offense of which you stand convicted. You may, if you wish, testify under oath as to such matters, or you may remain silent, in which case the court will not draw any inferences from your silence. In addition, you may, if you wish, make an unsworn statement in mitigation or extenuation of the offense of which you stand convicted. This unsworn statement is not evidence, and you cannot be cross-examined upon it, but the prosecution may offer evidence to rebut anything contained in the statement. The statement may be oral or in writing, or both. You may make it yourself, or it may be made by your counsel, or by both of you. Consult with your counsel and advise the court what you desire to do.

(Accused confers with counsel)

ACCUSED MRS. DIAL: I do not wish to present evidence.

LAW OFFICER: Does the defense counsel have anything further?

DEFENSE: No, sir.

LAW OFFICER: The court is advised that the maximum punishment as far as Specialist Dial is concerned, is a dishonorable discharge, total forfeitures, and confinement at hard labor for three years. As to Mrs. Dial, the maximum punishment is confinement at hard labor for three years.

I might further add, with regard to the case concerning Mrs. Dial, that a fine may be imposed against her in addition to the confinement, or, for that matter, in lieu of, whatever the court so determines. Forfeitures is not an appropriate sentence to be imposed against a civilian. Now, in order to enforce collection, a fine is usually accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall,

in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired.

Once again, the sentence should be arrived at separately, should be announced separately, and the required fraction for this type of sentence is two-thirds. So, re- [fol. 44] gardless of the majority in reaching the sentence, only two-thirds should be announced.

Let the record reflect that the manual of courts-martial has been withdrawn from the court. The court will not have a manual during its deliberations of the sentence.

The court will be closed.

(The court then closed at 1058 hours, 29 July 1957, until 1108 hours, 29 July 1957.)

PRESIDENT: The court will come to order.

TRIAL COUNSEL: All parties to the trial who were present when the court closed are again present.

SENTENCE

PRESIDENT: Specialist Second Class Dial, it is my duty as president of this court to inform you that the court, in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, sentences you:

> To be dishonorably discharged from the service, and to forfeit all pay and allowances, and to be confined at hard labor for three years.

PRESIDENT: Mrs. Dial, it is my duty as president of this court to inform you that the court, in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, sentences you:

> To be confined at hard labor for three years.

LAW OFFICER: Have you any other cases to try at this time?

TRIAL COUNSEL: The prosecution has no other cases to try at this time.

PRESIDENT: The court will be adjourned.

(The court then adjourned at 1110 hours, 29 July 1957.)

[fol. 45] AUTHENTICATION OF RECORD OF TRIAL

in the case of

The United States against Specialist Second Class James W. Dial and Joanna S. Dial, Dependent Wife, SP 2 Dial of Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company "B", 29th Tank Battalion, APO 34, US Army.

/s/ Jack R. Metzdorf
JACK R. METZDORF
Lt Col Armor
President

/s/ Joseph L. Chalk
JOSEPH L. CHALK
Lt Col JAGC
Law Officer

I have examined the record of trial in the foregoing case.

/s/ Arnold H. Lozowick
ARNOLD H. LOZOWICK
1st Lt JAGC
Defense Counsel

/s/ Robert N. Funk
ROBERT N. FUNK
1st Lt JAGC
Individual Counsel

[1] Delete inapplicable term. Trial counsel may not authenticate a general court-martial record.

[fol. 46]

HEADQUARTERS
2D ARMORED DIVISION
APO 42 US ARMY

9 September 1957

In the foregoing case of Specialist Second Class James W. Dial, RA 14 233 840, U. S. Army Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, 2d Armored Division, the sentence is approved. The forfeitures shall apply to pay and allowances becoming due on and after the date of this action. The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. Pending completion of appellate review, the accused will be confined in the United States Army Branch Disciplinary Barracks, New Cumberland, Pennsylvania.

W. Paul Johnson
Major General, USA
Commanding

[fol. 47]

HEADQUARTERS
2D ARMORED DIVISION
APO 42 US ARMY

9 September 1957

In the foregoing case of Joanna D. Dial, also known as Joanna S. Dial, a person accompanying the Armed Forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class James W. Dial, RA 14 233 840, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, 2d Armored Division, the sentence is approved. The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. Pending completion of appellate review, the accused will be confined in the Federal Reformatory for Women, Alderson, West Virginia.

W. Paul Johnson
Major General, USA
Commanding

[fol. 48] PROSECUTION EXHIBIT 1

STIPULATION

It is hereby stipulated and agreed by and between the prosecution and defense, by and with the consent of the accused, Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion and Joanna S. Dial, a person accompanying the armed forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class James W. Dial that the following facts are true:

Prior to the dates alleged in the specification, the accused occupied Government quarters at Apartment 3-F, Building 8828, Fallenberg Housing Area, Baumholder, Germany with their dependent children, Harry E. Singleton (date of birth 6 June 1952), stepson of the accused James W. Dial, natural son of accused Joanna S. Dial; Reginald E. Dial (date of birth 12 May 1954); James W. Dial, Junior, the deceased (date of birth 14 March 1956); and Deborah M. Dial (date of birth 18 March 1957).

In chastising the deceased child, James W. Dial, Junior, on numerous occasions during the several weeks preceding 21 May 1957, both accused beat him about the head and body with their hands, a military web belt, pieces of wood from a milk crate, and an electric extension cord. These beatings were inflicted because the child would not eat and to make him stop crying. These beatings were usually inflicted in fits of temper.

On about 17 May 1957, the deceased child was crying, and in an effort to stop his crying, the accused, Specialist Second Class James W. Dial, deliberately and forcibly struck the head of James W. Dial, Junior against the headboard of his crib.

On the morning of 21 May 1957, after the accused, Specialist Second Class James W. Dial had gone to work, the accused, Mrs. Joanna S. Dial, attempted to feed their child James W. Dial, Junior, but he would not eat; so

she put him back in his crib. She went back to the kitchen and then heard James scream. She went to him. He was screaming, lying on his back, breathing heavily, his lips pushed out, his eyes rolled back in his head, and he was kicking his legs and rolling his head from side to side. She telephoned her husband, the accused Specialist Second Class Dial, and told him to come home. He did come home and called an ambulance. She then removed the child's blood-stained undershirt, put on a clean shirt, changed his diaper and placed the child on the living-room couch. The ambulance arrived and the child was transported to the hospital, where he was pronounced dead on arrival at 1155 hours, 21 May 1957.

The attached photographs, numbered 1a, 1b, 1c, and 1d, accurately represent the condition of the body of the deceased child with regard to external injuries when he was pronounced dead on arrival at the hospital. The exoriation, maceration and scarring of the skin in the area of the genitals and anus were caused by lack of proper hygenic care of the child. Other visible wounds not depicted in the attached photographs include a swollen, lacerated upper lip and an open bloody wound below [fol. 49] the right eye. In addition to the visible wounds, an autopsy revealed a "V" shaped fracture over 13 centimeters in length in the left parietal bone of the skull, with some underlying brain damage, and ruptures of both lobes of the liver. It was further determined by autopsy that the deceased was undernourished and anemic. The fractured skull had been sustained between four (4) and ten (10) days prior to death and the ruptured liver was sustained between twelve (12) and thirty-six (36) hours before death. There was no finding by autopsy of any disease or other natural cause of death. Medical attention for such wounds and injuries was neither sought nor administered by either accused until the child was brought to the hospital on 21 May 1957, although many of the visible wounds were inflicted at least two (2) weeks prior to 21 May 1957.

The death of James W. Dial, Junior was the result of the wounds and injuries inflicted upon him by both accused.

/s/ Arnold H. Lozowick
ARNOLD H. LOZOWICK
1st Lt JAGC
Defense Counsel

/s/ Robert N. Funk
ROBERT N. FUNK
1st Lt JAGC
Defense Counsel

/s/ James W. Dial
JAMES W. DIAL
SP 2 RA 14 233 840
Accused

/s/ Joanna S. Dial
JOANNA S. DIAL
Depn Wife PP #102 142
Accused

/s/ Francis R. Buckley
1st Lt JAGC
Trial Counsel

[fol. 50] APPELLATE EXHIBIT "1"

Guilty Plea in the General Court-Martial Case of Joanna S. Dial, Dependent Wife of Specialist Second Class James W. Dial

AETAJA 250.45
CG

SJA

24 July 1957
Lt Col Husband/js 8317

1. The following court-martial charges against Joanna S. Dial, dependent wife of Specialist Second Class James W. Dial, alleging a joint offense with Specialist Second Class James W. Dial, Company B, 2d Medium Tank Battalion (Patton) 35th Armor, formerly Company B, 29th Tank Battalion, have been referred to a general court-martial for trial:

a. Charge: Violation of the Uniform Code of Military Justice, Article 118.

b. Specification 1: Acting jointly and in pursuance of a common intent with Specialist Second Class James W. Dial, did, at Baumholder, Germany, on or about 21 May 1957, murder James W. Dial, Junior, by means of inflicting numerous beatings upon the head and body of the said James W. Dial, Junior, during a period of several weeks preceding 21 May 1957, with instrumentalities and means likely to produce grievous bodily harm, to wit: their hands, an electric extension cord, a piece of wood, and a web belt, and by forcibly striking the head of the said James W. Dial, Junior, against a crib headboard.

c. Specification 2: Acting jointly and in pursuance of a common intent with Specialist Second Class James W. Dial, did, at Baumholder, Germany, on or about 21 May 1957, murder James W. Dial, Junior, by wrongfully and willfully failing in their duty as parents of the said James W. Dial, Junior, to seek and provide adequate medical care and attention for wounds and injuries about the head and body suffered by the said James W. Dial, Junior, in the course of beatings inflicted by them during a period of several weeks preceding 21 May 1957, which

failure in their parental duty resulted in the death of the said James W. Dial, Junior, from said wounds and injuries.

d. The accused's age is 22 years and 6 months.

2. Attached is a written offer signed by the accused and witnessed by her individual military defense counsel, dated 23 July 1957, in which the accused states that she will enter a plea of guilty to the lesser included offense of involuntary manslaughter of James W. Dial, Junior, under Article 119, Uniform Code of Military Justice, if it is agreed that the accused will not be prosecuted on the original charge of unpremeditated murder.

3. Recommend that the accused's offer be accepted and that charges against the accused alleging that she separately committed the lesser included offense of involuntary manslaughter in violation of Article 119, Uniform Code of Military Justice, be tried in a common trial with similar charges against her husband, Specialist Second Class James W. Dial.

1 Incl

Guilty Plea Offer

HOWARD O. HUSBAND
Lt Col, JAGC
Staff Judge Advocate

[fol. 51] 1. The offer is accepted.

2. Joanna S. Dial, dependent wife of Specialist Second Class James W. Dial, will be tried on charges alleging that she separately committed the lesser included offense of involuntary manslaughter, and in a common trial as recommended.

1 Incl

n/c

W. PAUL JOHNSON
Maj Gen, USA
Commanding

[fol. 52] COMPANY B
2D MEDIUM TANK BATTALION (PATTON)
35TH ARMOR
APO 34 US ARMY

23 July 1957

Commanding General
2d Armored Division
APO 42, US Army

Dear Sir:

In reference to my impending trial by general court-martial on charges alleging two specifications in violation of Article 118(2), Uniform Code of Military Justice, I will enter a plea of guilty to the lesser-included offense of involuntary manslaughter of James W. Dial, Junior, under Article 119(b), Uniform Code of Military Justice, if it is agreed that I will not be prosecuted on the original charge. This offer is not to be construed as consent on my part to the exercise of jurisdiction over me by the military court.

/s/ Joanna S. Dial
JOANNA S. DIAL
Dependent wife of Specialist
Second Class James W. Dial,
RA 14 233 840

Witnessed by:

/s/ Robert N. Funk
ROBERT N. FUNK
1st Lt JAGC
Individual Military Defense Counsel

[fol. 53] APPELLATE EXHIBIT "2"

Guilty Plea in the General Court-Martial Case of Specialist Second Class James W. Dial

AETAJA 250.45
CG

SJA

24 July 1957

Lt Col Husband eg 8317

1. The following court-martial charges against Specialist Second Class James W. Dial, Company B, 2d Medium Tank Battalion (Patton) 35th Armor, formerly Company B, 29th Tank Battalion, alleging a joint offense with Joanna S. Dial, dependent wife of Specialist Second Class James W. Dial have been referred to a general court-martial for trial:

a. Charge: Violation of the Uniform Code of Military Justice, Article 118.

b. Specification 1: Acting jointly and in pursuance of a common intent with Joanna S. Dial, dependent wife of the said Specialist Second Class James W. Dial, did, at Baumholder, Germany, on or about 21 May 1957, murder James W. Dial, Junior, by means of inflicting numerous beatings upon the head and body of the said James W. Dial, Junior, during a period of several weeks preceding 21 May 1957, with instrumentalities and means likely to produce grievous bodily harm, to wit: their hands, an electric extension cord, a piece of wood, and a web belt, and by forcibly striking the head of the said James W. Dial, Junior, against a crib headboard.

c. Specification 2: Acting jointly and in pursuance of a common intent with Joanna S. Dial, dependent wife of the said Specialist Second Class James W. Dial, did, at Baumholder, Germany, on or about 21 May 1957, murder James W. Dial, Junior, by wrongfully and willfully failing in their duty as parents of the said James W. Dial, Junior, to seek and provide adequate medical care and attention for wounds and injuries about the head and body suffered by the said James W. Dial, Junior,

in the course of beatings inflicted by them during a period of several weeks preceding 21 May 1957, which failure in their parental duty resulted in the death of the said James W. Dial, Junior, from said wounds and injuries.

d. Personal data concerning the accused:

(1) Age: 28 years, 8 months.
(2) Prior Service: 7 years, 20 days.
(3) Current Service: Enlisted 8 March 1954 for 6 years.
(4) Previous Convictions: None
(5) Immediate commander's statement as to character of accused's service prior to the offenses charged: Good

[fol. 54] 2. Attached is a written offer signed by the accused and witnessed by the defense counsel, dated 23 July 1957, in which the accused states that he will enter a plea of guilty to the lesser-included offense of involuntary manslaughter of James W. Dial, Junior, under Article 119, Uniform Code of Military Justice, if it is agreed that the accused will not be prosecuted on the original charge of unpremeditated murder.

3. Recommend that the accused's offer be accepted, and that charges against the accused alleging that he separately committed the lesser-included offense of involuntary manslaughter in violation of Article 119, Uniform Code of Military Justice, be tried in a common trial with similar charges against Joanna S. Dial, dependent wife of the accused.

1 Incl:

Guilty Plea Offer

HOWARD O. HUSBAND
Lt Col, JAGC
Staff Judge Advocate

To: SJA From: CG Date: 24 July 1957
Comment Nr 2

1. The offer is accepted.

2. Specialist Second Class James W. Dial will be tried on charges alleging that he separately committed the lesser-included offense of involuntary manslaughter, and in a common trial as recommended.

1 Incl
n/c

W. PAUL JOHNSON
Maj Gen, USA
Commanding

[fol. 55]

COMPANY B
2D MEDIUM TANK BATTALION (PATTON)
35TH ARMOR
APO 34 US ARMY

23 July 1957

Subject: Offer of Guilty Plea; Trial by General Court-Martial

To: Commanding General
2d Armored Division
APO 42, US Army

1. Reference is made to my impending trial by general court-martial on charges alleging two specifications in violation of Article 118(2), Uniform Code of Military Justice.

2. I will enter a plea of guilty to the lesser-included offense of involuntary manslaughter of James W. Dial, Junior, under Article 119(b), Uniform Code of Military Justice, if it is agreed that I will not be prosecuted on the original charge.

/s/ James W. Dial
JAMES W. DIAL
Specialist Second Class
RA 14 233 840

Witnessed by:

/s/ Arnold H. Lozowick
ARNOLD H. LOZOWICK
1st Lt JAGC
Defense Counsel

[fol. 56] APPELLATE EXHIBIT "3"

OUT-OF-COURT-HEARING

(The out-of-court hearing convened at 1023 hours, 29 July 1957)

LAW OFFICER: Let the record reflect that the members of the court have withdrawn, and present at this out-of-court hearing are counsel for both sides, two accused, the law officer and the reporter.

LAW OFFICER: Now, was there a pre-trial agreement in connection with each accused's plea of guilty?

TRIAL COUNSEL: Yes, sir, there was a written agreement which is now in the hands of the defense counsel.

LAW OFFICER: May I see those agreements, please?

(Documents tendered)

TRIAL COUNSEL: Amend my last statement to "There were two written agreements, one of each accused."

LAW OFFICER: These agreements will be received by the court and marked Appellate Exhibits 1 and 2, respectively. Appellate Exhibit 1 will be the agreement tendered by Mrs. Dial; and Appellate Exhibit 2 will be the agreement tendered by Specialist Dial.

Now, Mrs. Dial, I would like to ask you a few questions. Do you understand this agreement, this offer that you made to the convening authority?

ACCUSED MRS. DIAL: I do.

LAW OFFICER: As I understand it, the charge originally was a more serious charge, is that correct?

ACCUSED MRS. DIAL: Yes.

LAW OFFICER: And you offered to plead guilty if the convening authority in turn agreed to reduce that charge to involuntary manslaughter, is that correct?

ACCUSED MRS. DIAL: Yes.

LAW OFFICER: Do you understand that regardless of what sentence is imposed upon you by this court, the terms of this agreement do not require the convening authority to make any reduction of your sentence?

ACCUSED MRS. DIAL: Yes.

LAW OFFICER: You do understand that.

ACCUSED MRS. DIAL: Yes.

[fol. 57] LAW OFFICER: Now, I would like to ask you, Mrs. Dial, are you satisfied with the counsel that has been furnished you to prepare your defense and conduct your defense?

ACCUSED MRS. DIAL: Yes, I am.

LAW OFFICER: And are you pleading guilty because you are satisfied in your own mind that you are guilty?

ACCUSED MRS. DIAL: Yes.

LAW OFFICER: Now, Specialist Dial, do you understand this agreement that you have entered into with the convening authority?

ACCUSED SPECIALIST DIAL: Yes, sir.

LAW OFFICER: Now, I understand that originally there was preferred against you a more serious charge, is that correct?

ACCUSED SPECIALIST DIAL: Yes, sir. There was, sir.

LAW OFFICER: And I understand also, am I correct, that you offered to the convening authority to plead guilty providing he would reduce the charge to a charge of involuntary manslaughter.

ACCUSED SPECIALIST DIAL: Yes, sir; that's right.

LAW OFFICER: Do you understand that regardless of the sentence this court gives you, imposes upon you, the convening authority is not required to make any reduction in the sentence under the terms of that agreement?

ACCUSED SPECIALIST DIAL: Yes, sir.

LAW OFFICER: Are you satisfied with counsel appointed to defend you?

ACCUSED SPECIALIST DIAL: Yes, sir; I am, sir.

LAW OFFICER: And you are pleading guilty because you are satisfied in your own mind that you are guilty?

ACCUSED SPECIALIST DIAL: Yes, sir.

LAW OFFICER: I would like to advise both of you, Specialist Dial and Mrs. Dial, that you may withdraw your plea of guilty and substitute therefor a plea of not guilty at any time before the court imposes sentence upon you. Do you understand that?

ACCUSED SPECIALIST DIAL: Yes, sir.

ACCUSED MRS. DIAL: Yes.

LAW OFFICER: I wonder if I can have counsel up here for a moment.

(A side-bar conference was held.)

LAW OFFICER: Now, this instruction applies to both of you: You have pleaded guilty to the specification and charge. By so doing, you have admitted every act or omission charged, and every element of that included offense. Your plea subjects you to a finding of guilty [fol. 58] without further proof of that offense, in which event you may be sentenced by the court to the maximum punishment authorized for it. In this case the maximum punishment is, in your case, Specialist Dial, a dishonorable discharge, total forfeitures, confinement at hard labor for three years. Mrs. Dial, in your case the maximum punishment would be confinement at hard labor for three years and whatever fine the court found appropriate, if it determined a fine was appropriate.

Now, you are legally entitled to plead not guilty and place the burden upon the prosecution of proving your guilt of that offense. Your plea will not be accepted unless you understand its meaning and effect.

Mrs. Dial, do you understand?

ACCUSED MRS. DIAL: Yes.

LAW OFFICER: And understanding this, do you persist in your plea of guilty?

ACCUSED MRS. DIAL: Yes.

LAW OFFICER: Specialist Dial, do you understand my instructions?

ACCUSED SPECIALIST DIAL: Yes, sir.

LAW OFFICER: And understanding this instruction, do you persist in your plea of guilty?

ACCUSED SPECIALIST DIAL: Yes, sir.

LAW OFFICER: Very well, the court will accept the pleas of both accused.

That terminates the out-of-court hearing, and we will call the court back in.

(The out-of-court hearing then adjourned at 1032 hours, 29 July 1957.)

[fol. 59] UNITED STATES COURT OF MILITARY APPEALS

No. 11,425

UNITED STATES, APPELLEE

v.

JOANNA S. DIAL, Dependent Wife of Specialist Second Class James W. Dial, U. S. Army, APPELLANT

On Certification from The Judge Advocate General of the United States Army

Decided August 26, 1958

Captain Arnold I. Melnick argued the cause for Appellant, Accused. With him on the brief were *Colonel James Garnett* and *Captain John F. Christensen.*

First Lieutenant William H. Keniry argued the cause for Appellee, United States. With him on the brief were *Colonel J. L. Searles* and *Major Thomas J. Nichols.*

OPINION OF THE COURT

ROBERT E. QUINN, Chief Judge:

The accused and her husband were charged with causing the death of their one-year-old son. They were convicted by a general court-martial [1] in Germany of involuntary manslaughter, in violation of Article 119, Uniform Code of Military Justice, 10 USC § 919. A board of review affirmed the conviction. The Judge Advocate General of the Army filed a certificate requesting this Court

[1] CM 397520

to consider whether the court-martial had constitutional power to try the accused as a civilian dependent accompanying the Army in West Germany.

[fol. 60] Article 2 (11) of the Uniform Code, 10 USC § 802, confers jurisdiction upon a court-martial to try civilian dependents of service personnel who accompany the armed forces outside of the continental limits of the United States. Last year the United States Supreme Court by divided vote held that the congressional grant of power was unconstitutional as applied to a civilian dependent charged with a capital offense in time of peace. The majority opinion written by Justice Black and concurred in by the Chief Justice and Justices Douglas and Brennan contains dictum to the effect that, under the Constitution, Congress cannot subject civilian dependents accompanying the armed forces abroad in peacetime to court-martial jurisdiction regardless of the nature of the offense. The other concurring Justices, Frankfurter and Harlan, specifically limited their agreement with Mr. Justice Black; they concurred on the ground that the offense charged was capital. Reid v Covert, 354 US 1, 1 L ed 2d 1148, 77 S Ct 1222 (1957).

Appellate defense counsel and the Government present substantially the same arguments that were urged before the United States Supreme Court in the Reid v Covert case. We have gone over much the same ground in other cases before us. See United States v Burney, 6 USCMA 776, 21 CMR 98; United States v Wilson, 9 USCMA 60, 25 CMR 322. All that remains is to determine whether dependents of military personnel in foreign lands, who are associated with the military in every way but for the performance of military duties, can constitutionally be considered by Congress as part of the armed forces for the purpose of regulating their conduct on the same basis as those in uniform. In our opinion, Congress has that power.

We answer the certified question in the affirmative, and affirm the decision of the board of review.

Judge FERGUSON concurs.

Judge LATIMER's action will come later.

[fol. 61] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA

HABEAS CORPUS
No. 2145

UNITED STATES OF AMERICA on the relation of
ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, Warden of the Federal Reformatory for Women, Alderson, West Virginia, RESPONDENT

ORDER ISSUING WRIT OF HABEAS CORPUS—September 5, 1958

This 12th day of August, 1958, came Alberta Singleton (United States of America ex. rel.) by Paul M. Friedberg, her attorney, and tendered and asked leave to file her petition for Writ of Habeas Corpus herein, which Petition is ORDERED filed.

The Court, having considered the allegations of said Petition and having heard the argument of counsel thereon, it is ORDERED that a writ of habeas corpus be and the same is hereby granted and issued, directed to Nina Kinsella, Warden of the Federal Reformatory for Women, Alderson, West Virginia, commanding her to produce the body of Mrs. Joanna S. Dial before this Court for a hearing on said Petition at Charleston, West Virginia, on the 5th day of September, 1958, at 10:00 A.M., Eastern Standard Time.

Enter:

/s/ Ben Moore
United States District Judge

[fol. 62] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT

Habeas Corpus No. 2145

UNITED STATES OF AMERICA, on the relation of ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, Warden of the Federal Reformatory for Women, Alderson, West Virginia

Paul M. Friedberg, Charleston, West Virginia, for relator.

Duncan W. Daugherty, United States Attorney, Huntington, West Virginia, Percy H. Brown, Assistant United States Attorney, Hinton, West Virginia, Lt. Col. Peter S. Wondolowski, Judge Advocate General's Corps, United States Army, for respondent.

MOORE, Chief Judge.

OPINION—September 6, 1958

More than a year ago, the Supreme Court of the United States, on a rehearing, decided in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger*, 354 U.S. 1, 77 Sup. Ct. 1222 (1957), that civilian dependents of members of the armed forces overseas in time of peace could not be tried by court-martial for capital offenses. Since that time, considering itself bound by that decision, this court granted a writ of habeas corpus in a case involving a trial by court-martial of such a civilian dependent for the unpremeditated murder of her husband, a non-capital offense. *United States ex rel. Smith* v. *Kinsella* (D.C. S.D. W.Va. No. 1963, unreported). Now petitioner asks the court to grant a writ of habeas corpus to free one Joanna S. Dial, convicted by court-martial of the non-capital offense of involuntary manslaughter of her one-year old son. She was a civilian dependent of her husband, a member of the armed forces overseas. The offense was committed in Germany.

Counsel for respondent stated at the hearing that the case of *Smith* v. *Kinsella, supra*, was not appealed because [fol. 63] of a decision by army authorities that the distinction between it and the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger* was not plain enough on which to seek clarification of the last mentioned decision. He, however, argued that this court should not grant the writ in this case for the following reasons:

(1) Only four of the Justices of the Supreme Court who participated in the decision in *Reid* v. *Covert* and *Kinsella* v. *Krueger* held that *no* offense committed by civilian dependents of members of the armed forces overseas in time of peace may be tried by court-martial, whereas two of the other Justices limited their decision in this respect to capital offenses.

(2) That since the Supreme Court decision and since the decision of this court in the case of *Smith* v. *Kinsella, supra*, two district courts, in cases involving civilians employed by the armed forces overseas, who were charged with and convicted of offenses less than capital offenses, have distinguished these cases and have discharged the writs. *United States ex rel. Guagliardo* v. *McElroy*, 158 F. Supp. 171 (D.C. Dist. of Col. 1958); *Grisham* v. *Taylor*, 161 F. Supp. 112 (M.D. Pa. 1958). These two cases are said to be pending upon appeal in their respective circuits.

(3) That the United States Court of Military Appeals, in the very case now under consideration, decided on August 26, 1958, that the court-martial had constitutional power to try Joanna S. Dial as a civilian dependent accompanying the army in West Germany.

It is, of course, known that the opinion of this court prior to the decision of the Supreme Court in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger* was that Congress had power under Article 1, Section 8 of the Constitution of the United States to include civilian dependents accompanying the armed forces overseas as subjects of [fol. 64] the Uniform Code of Military Justice, and therefore properly triable by court-martial for infractions of that Code. In fact, one of those cases, *Kinsella* v. *Krueger* was appealed from a decision of this court.

In the majority opinion of Mr. Justice Black reversing the case from this court and affirming the case of *Reid* v. *Covert*, he began by saying, "These cases . . . involve the power of Congress to expose civilians to trial by military tribunals, under military regulations and procedures, for offenses against the United States. . . ."

Had I regarded the offense committed by Mrs. Dorothy Krueger Smith as an offense against the United States (outside the Uniform Code of Military Justice) I would have been inclined to award her the writ here. However, it was and is my opinion that the only basis for defining murder by a civilian in Japan, Germany, or any other foreign sovereignty as a crime against the United States is that it is made so by the Uniform Code of Military Justice. If this be correct, then obviously, unless the inclusion of such civilian dependents as subjects of the Uniform Code of Military Justice be a constitutional exercise of Congressional power, such a crime committed in a foreign country is not a crime against the United States, but a crime against the foreign country where it may be committed.

However, the concurrence of six Justices of the Supreme Court in the affirmance of *Reid* v. *Covert* and the reversal of the companion case of *Krueger* v. *Kinsella*, (styled *Kinsella* v. *Krueger* in the Supreme Court), indicates to me that these Justices all regarded crimes such as those I have mentioned as crimes against the United States. I can conceive of no other reason why they would have concluded that the persons accused in those cases had the constitutional right to be tried in the civil courts of the United States. I believe that I am bound by that decision, much as I may disagree with it.

[fol. 65] Moreover, I can think of no logical distinction, insofar as the constitutional power of Congress is concerned, between its asserted power, denied by the Supreme Court, to subject dependents of members of the armed forces overseas to the jurisdiction of courts-martial for capital offenses, and the like questioned power in cases of non-capital offenses. Of course, where matters of life or death are involved, the facts must be scrutinized closely and the decision carefully weighed; but when ar-

rived at, the applicable principle applies alike in all similar cases.

Believing myself bound by the decision of the Supreme Court in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger*, I will grant the writ prayed for and discharge Joanna S. Dial from custody.

/s/ Ben Moore
United States District Judge

September 6, 1958.

[fol. 66] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Charleston 29, West Virginia

Chambers of
BEN MOORE, District Judge

September 6, 1958

Hon. Percy H. Brown,
Assistant United States Attorney,
Charleston, West Virginia

Paul M. Friedberg, Esq.,
Attorney at Law,
Security Building
Charleston, West Virginia

Honorable Duncan W. Daugherty,
United States Attorney,
Huntington, West Virginia

In re: United States of America, on the relation of Alberta Singleton v. Nina Kinsella, Warden. Habeas Corpus No. 2145.

Gentlemen:

After carefully considering the argument of counsel and the brief of respondent, I have reached the same conclusion in the above case as in that of *Louise Smith* v. *Kinsella* decided one year ago in which the writ was granted.

I am of opinion that the principle announced in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger* is controlling here. Therefore, I will award the writ.

Yours truly,

/s/ Ben Moore
United States District Judge

[fol. 67] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT

HABEAS CORPUS

No. 2145

UNITED STATES OF AMERICA on the relation of
ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, Warden of the Federal Reformatory for Women, Alderson, West Virginia, RESPONDENT

ORDER DISCHARGING PETITIONER FROM CUSTODY—
Entered September 8, 1958

This matter having been regularly brought on the 5th day of September, 1958, for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the Court ordered that the said Mrs. Joanna S. Dial in whose behalf the Writ of Habeas Corpus was sued out, is illegally restrained of her liberty, as alleged in the petition herein, and that she be and she is hereby discharged from the custody of Nina Kinsella, Warden of the Federal Reformatory for Women, at Alderson, West Virginia, from whom she has been produced.

Enter:

/s/ Ben Moore
United States District Judge

[fol. 68] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HABEAS CORPUS NO. 2145

UNITED STATES EX REL ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, Warden, Federal Reformatory for Women, Alderson, West Virginia, RESPONDENT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed October 8, 1958

I

NOTICE is hereby given that Nina Kinsella, Warden, Federal Reformatory for Women, Alderson, West Virginia, the respondent above named, hereby appeals to the Supreme Court of the United States from the order entered on September 8, 1958, in the above-numbered habeas corpus proceeding, releasing Joanna S. Dial from the custody of respondent, who held the said Joanna S. Dial pursuant to a sentence imposed by a general court martial for violation of Article 119 of the Uniform Code of Military Justice (10 U.S.C. 919 Supp. V) (Manslaughter).

The appeal is taken pursuant to 28 U.S.C. 1252.

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Transcript of docket entries.
2. The petition for writ of habeas corpus.
3. Return and answer.
4. Memoranda of points and authorities in support of return and answer.

[fol. 69] 5. Exhibit A, General court martial orders Nos. 35, 34, 129.

6. Exhibit B, Board of Review decision.
7. Exhibit C, Pleadings and briefs, orders, Certificate of Review by Judge Advocate General.
8. Exhibit D, Record of court martial trial.
9. Exhibit E, Decision of the United States Court of Military Appeals.
10. Order dated August 12, 1958, issuing the writ of habeas corpus.
11. Opinion of the court dated September 6, 1958.
12. Order of the Court discharging petitioner from custody, dated September 8, 1958.
13. This notice of appeal.

III

The following question is presented by this appeal.

Whether Article 2 (11) of the Uniform Code of Military Justice (10 U.S.C. 802 Supp. V) providing for court martial jurisdiction of persons accompanying the Armed Forces overseas is constitutional when applied to a serviceman's civilian dependent wife who was convicted by a general court martial for a non-capital offense.

s/ Duncan W. Daugherty
United States Attorney, Southern District of West Virginia

Attorney for Nina Kinsella, Warden, Federal Reformatory for Women, Alderson, West Virginia, APPELLANT

ADDRESS: Post Office Building
Huntington, West Virginia

[fol. 70] PROOF OF SERVICE

(Omitted in printing)

[fols. 71-73] • • •

[fol. 74] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 75] SUPREME COURT OF THE UNITED STATES

No. 571, October Term, 1958

KINSELLA, Warden, APPELLANT

v.

UNITED STATES EX REL. SINGLETON

APPEAL from the United States District Court for the Southern District of West Virginia.

ORDER NOTING PROBABLE JURISDICTION—February 24, 1959

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the summary calendar and set for argument immediately following No. 570.

February 24, 1959

on October 8, 1958. The time to docket the record has been extended to and including December 19, 1958. The jurisdiction of this Court to review on direct appeal the decision of the District Court discharging Mrs. Dial from custody on the ground that the Act of Congress under which she was being held in confinement upon conviction by court-martial is unconstitutional is conferred by 28 U. S. C. 1252.

STATUTE INVOLVED

Article 2 of the Uniform Code of Military Justice, 10 U. S. C. (Supp. V) 802, 64 Stat. 109, as codified, 70A Stat. 37, provides in pertinent part:

> *Art.* 2. *Persons subject to this Chapter.*
>
> The following persons are subject to this chapter: * * *
>
> (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

QUESTION PRESENTED

Whether Article 2 (11) of the Uniform Code of Military Justice providing for court-martial jurisdiction of persons accompanying the armed forces overseas is constitutional when applied to the case of a soldier's spouse who accompanied her husband to Germany and who was convicted by court-martial of the noncapital offense of manslaughter.

STATEMENT

Mrs. Dial, the prisoner, is the wife of a soldier, Specialist Second Class James W. Dial, who accompanied her husband overseas to his military station in Germany. She had traveled to Germany at Government expense and lived with her husband at public quarters on the military base.

In June 1957, after investigation, Mrs. Dial and her husband were charged with involuntary manslaughter arising out of the death of their one-year old infant son because of severe beatings administered by the parents. The offense charged was a violation of Article 119 of the Uniform Code of Military Justice, a non-capital offense, 10 U. S. C. (Supp. V) 919. Both Mrs. Dial and her husband entered pleas of guilty to the offense charged and each was sentenced to confinement for a term of three years. Military appellate review under the Uniform Code has been completed in each case. The sentence of the husband was ordered into execution and he is now serving his confinement at the Branch United States Disciplinary Barracks at Lompoc, California. Mrs. Dial's conviction and sentence were affirmed by the United States Court of Military Appeals on August 26, 1958.

On August 12, 1958, while Mrs. Dial was serving her sentence of confinement at the Federal Reformatory for Women, Alderson, West Virginia, a petition for a writ of habeas corpus was filed on her behalf in the court below. Upon consideration of the petition, the return and answer of appellant, and after

hearing, the District Court entered an order granting the writ of habeas corpus, on September 8, 1958. The court ruled that "Believing myself bound by the decision of the Supreme Court in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger* [354 U. S. 1], I will grant the writ prayed for and discharge Joanna S. Dial from custody." See Appendix, *infra*, p. 13.

THE QUESTION IS SUBSTANTIAL

The District Court has invalidated an Act of Congress—Article 2 (11) of the Uniform Code of Military Justice—insofar as it applies to a military dependent overseas who is charged with, and tried by court-martial for, a non-capital offense. This issue was not decided by the Court in *Reid* v. *Covert*, 354 U. S. 1, but was expressly left open. It is a substantial question which warrants resolution by this Court.

1. In granting the petition for writ of habeas corpus filed on Mrs. Dial's behalf, the District Court held itself bound by the decision in *Reid* v. *Covert*, 354 U. S. 1. The District Court could find "no logical distinction" between capital and non-capital offenses committed by dependents of members of the armed forces serving overseas insofar as their amenability to military jurisdiction is concerned.

However, in *Covert* and *Krueger*, the dependent spouses were both charged with the commission of premeditated murder—a capital crime. That the capital nature of the offense was critical to the Court's decision is shown by the concurring opinion of Mr. Justice Frankfurter who stated (354 U. S at 45): "The Court has not before it, and therefore I need not

intimate any opinion on, situations involving civilians, in the sense of persons not having a military status, other than dependents. Nor do we have before us a case involving a non-capital crime." Mr. Justice Frankfurter also said (354 U. S. at 45):

> These cases involve the validity of procedural conditions for determining the commission of a crime in fact punishable by death. The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights.

Mr. Justice Harlan, too, concurred in the result only "on the narrow ground that where the offense is capital, Article 2 (11) cannot constitutionally be applied to the trial of civilian dependents" (354 U. S. at 65), and he also stated that "except for capital offenses * * * I am by no means ready to say that Congress' power to provide for trial by court-martial of civilian dependents overseas is limited by Article III and the Fifth and Sixth Amendments" (354 U. S. at 76).

It seems clear, therefore, that the majority of the Court has not passed on the issue of the validity of Article 2 (11) as applied to dependents in non-capital cases. We are not asking the Court to reconsider its recent decision in *Covert;* what we ask is that the *Covert* ruling be not extended beyond capital offenses.

2. The object of Article 2 (11) was to insure a uniform system of justice, not only among the uniformed personnel of the armed forces, but also among such other persons and personnel whose connection

with the armed forces overseas was so inextricable as to constitute all of them an integral part of the military community overseas. This case typifies the legislative purpose: Mrs. Dial and her husband were charged with the commission of the same offense, the noncapital offense of manslaughter in violation of the Uniform Code, punishable by confinement for three years. Court-martial jurisdiction over the soldier-husband existed by virtue of Article 2 (1) of the Code; unless court-martial jurisdiction over the wife could be exercised under section 11 of the same article, a grave disparity in procedure—and substance—would exist.

In the many military installations which the armed services are forced to maintain overseas because of present world conditions, the dependents of soldiers, sailors, and airmen who accompany their husbands constitute an important factor. They are permitted to accompany their husbands at military expense because it is recognized that they form an essential facet of the military organization. They are there for the purpose of maintaining morale, which in turn helps to maintain an effective military organization. If the armed forces are considered to be one unified organization under the commander of the installation, as they must be, then the dependents who accompany the troops are a part of the same unity. They are considered by the American contingent as well as by the local governments and populations as a part of the visiting American forces. Thus, they have a status which is different from that of the non-military American civilian who lives or

travels abroad. They are members of the American military contingent or force and have rights to quarters provided by our Government, to the use of military post exchanges and schools, to exemption from local taxation, etc.—rights which are afforded them because of their intimate contact with the military.

The commanders of the military installations have full responsibility over all persons under their commands. In many instances all persons attached to the American military contingent are free from custom duties and the immigration processes which are ordinarily imposed by local authorities. In this respect the foreign governments have surrendered or waived their sovereign rights over these dependents because of our assumption of responsibility. Concomitantly with our responsibility there must be normal power to maintain law and order.

If permitted to stand, the serious impact of the lower court's ruling on the morale and discipline of the armed forces is apparent. Mrs. Dial and her husband committed a common offense, were charged with a common crime, and in a common trial both pleaded guilty. They received identical sentences. The husband because he wore a uniform must serve and is serving his sentence. The wife, because she did not wear a uniform, is freed from punishment. Under the ruling below, wives and other dependents cannot be tried by court-martial for any offenses they may commit, with the result that a substantial part of the military contingent is freed from effective justice.

3. Because the decision of this Court in the *Covert*

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Reid v. *Covert*, 354 U. S. 1 ..... 4, 5, 7, 8

Statutes:

Uniform Code of Military Justice, 64 Stat. 108, *et seq.*, as codified, 70A Stat. 36, 10 U. S. C. (Supp. V) 801, *et seq.*:

Article 2 (1) 6

Article 2 (11) 2, 4, 5, 6, 8

Article 119 3

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. ——

NINA KINSELLA, WARDEN, APPELLANT

v.

UNITED STATES EX REL. ALBERTA SINGLETON

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the District Court granting the writ of habeas corpus is not yet reported. A copy is set forth in the Appendix, *infra*, pp. 10–13.

JURISDICTION

On September 8, 1958, the District Court for the Southern District of West Virginia entered an order granting a writ of habeas corpus and ordering the discharge of Mrs. Joanna S. Dial (in whose behalf the writ was sought) from the custody of respondent (appellant here). Appendix, *infra*, p. 14. A notice of appeal to this Court was filed in the District Court

and *Krueger* cases was limited to capital cases, this case assumes an added importance and contains an added factor. One of the considerations which caused at least some of the members of the majority of the Court in *Covert* to decide as they did was that, if necessary, the perpetrators of capital offenses could be tried in some manner other than by courts-martial overseas. Because of the paucity of capital cases, Mr. Justice Frankfurter felt that it was a "manageable problem" (354 U. S. at p. 48). In his concurring opinion, Mr. Justice Harlan made the same observation (354 U. S. at p. 78): "The number of such cases would appear to be so negligible that the practical problems of affording the defendant a civilian trial would not present insuperable problems." Obviously, practical problems of much greater magnitude would be involved if provision would have to be made, perhaps by trial in this country, for every offense committed by the thousands of military dependents overseas. See, *e. g.*, footnote 12, 354 U. S. at 76, of Mr. Justice Harlan's concurring opinion in *Covert*. This factor not only distinguishes the instant case from that decided in *Covert*; it also serves to illustrate the magnitude and thus the importance of the issue now presented to the Court.

4. We shall not in this jurisdictional statement spell out the reasons, including the historical background and the practical problems involved, why we believe that Article 2 (11) is valid as applied to non-capital offenses by dependents. The Government's various briefs in the *Covert* and *Krueger* cases cover that ground. At the least, the arguments in support of the

statute's constitutionality show that the question raised here is a substantial one. In particular, for those who believe that the problem can only be solved by a weighing of the various interests—as do some of the Justices who participated in the majority decision in *Covert*—there are many factors still to be balanced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should note jurisdiction of this appeal.[1]

J. LEE RANKIN,
Solicitor General.
W. WILSON WHITE,
Assistant Attorney General.
HAROLD H. GREENE,
WILLIAM A. KEHOE, JR.,
Attorneys.

DECEMBER 1958.

---

[1] There is being filed simultaneously herewith, in the case of *McElroy* v. *United States ex rel. Guagliardo*, a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. That case involves the question of whether a person employed by the armed forces overseas is constitutionally amenable to trial by court-martial for the commission of a non-capital offense in violation of the Uniform Code of Military Justice.

APPENDIX

Habeas Corpus No. 2145

UNITED STATES OF AMERICA, ON THE RELATION OF ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA

Paul M. Friedberg, Charleston, West Virginia, for relator.

Duncan W. Daugherty, United States Attorney, Huntington, West Virginia, Percy H. Brown, Assistant United States Attorney, Hinton, West Virginia, Lt. Col. Peter S. Wondolowski, Judge Advocate General's Corps, United States Army, for respondent.

MOORE, *Chief Judge.*

Opinion

More than a year ago, the Supreme Court of the United States, on a rehearing, decided in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger,* 354 U. S. 1, 77 Sup. Ct. 1222 (1957), that civilian dependents of members of the armed forces overseas in time of peace could not be tried by court-martial for capital offenses. Since that time, considering itself bound by that decision, this court granted a writ of habeas corpus in a case involving a trial by court-martial of such a civilian dependent for the unpremeditated murder of her husband, a non-capital offense. *United States ex rel. Smith* v. *Kinsella* (D. C. S. D. W. Va. No. 1963, unreported). Now petitioner asks the court to grant a writ of habeas corpus to free one

Joanna S. Dial, convicted by court-martial of the non-capital offense of involuntary manslaughter of her one-year old son. She was a civilian dependent of her husband, a member of the armed forces overseas. The offense was committed in Germany.

Counsel for respondent stated at the hearing that the case of *Smith* v. *Kinsella, supra,* was not appealed because of a decision by army authorities that the distinction between it and the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger* was not plain enough on which to seek clarification of the last mentioned decision. He, however, argues that this court should not grant the writ in this case for the following reasons:

(1) Only four of the Justices of the Supreme Court who participated in the decision in *Reid* v. *Covert* and *Kinsella* v. *Krueger* held that *no* offense committed by civilian dependents of members of the armed forces overseas in time of peace may be tried by court-martial, whereas two of the other Justices limited their decision in this respect to capital offenses.

(2) That since the Supreme Court decision and since the decision of this court in the case of *Smith* v. *Kinsella, supra,* two district courts, in cases involving civilians employed by the armed forces overseas, who were charged with and convicted of offenses less than capital offenses, have distinguished these cases and have discharged the writs. *United States ex rel. Guagliardo* v. *McElroy,* 158 F. Supp. 171 (D. C. Dist. of Col. 1958); *Grisham* v. *Taylor,* 161 F. Supp. 112 (M. D. Pa. 1958). These two cases are said to be pending upon appeal in their respective circuits.

(3) That the United States Court of Military Appeals, in the very case now under consideration, decided on August 26, 1958, that the court-martial had

constitutional power to try Joanna S. Dial as a civilian dependent accompanying the army in West Germany.

It is, of course, known that the opinion of this court prior to the decision of the Supreme Court in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger* was that Congress had power under Article 1, Section 8 of the Constitution of the United States to include civilian dependents accompanying the armed forces overseas as subjects of the Uniform Code of Military Justice, and therefore properly triable by court-martial for infractions of that Code. In fact, one of these cases, *Kinsella* v. *Krueger* was appealed from a decision of this court.

In the majority opinion of Mr. Justice Black reversing the case from this court and affirming the case of *Reid* v. *Covert,* he began by saying, "These cases * * * involve the power of Congress to expose civilians to trial by military tribunals, under military regulations and procedures, for offenses against the United States * * *"

Had I regarded the offense committed by Mrs. Dorothy Krueger Smith as an offense against the United States (outside the Uniform Code of Military Justice) I would have been inclined to award her the writ here. However, it was and is my opinion that the only basis for defining murder by a civilian in Japan, Germany, or any other foreign sovereignty as a crime against the United States is that it is made so by the Uniform Code of Military Justice. If this be correct, then obviously, unless the inclusion of such civilian dependents as subjects of the Uniform Code of Military Justice be a constitutional exercise of Congressional power, such a crime committed in a foreign country is not a crime against the United States, but

a crime against the foreign country where it may be committed.

However, the concurrence of six Justices of the Supreme Court in the affirmance of *Reid* v. *Covert* and the reversal of the companion case of *Krueger* v. *Kinsella,* (styled *Kinsella* v. *Krueger* in the Supreme Court), indicates to me that these Justices all regarded crimes such as those I have mentioned as crimes against the United States. I can conceive of no other reason why they would have concluded that the persons accused in those cases had the constitutional right to be tried in the civil courts of the United States. I believe that I am bound by that decision, much as I may disagree with it.

Moreover, I can think of no logical distinction, insofar as the constitutional power of Congress is concerned, between its asserted power, denied by the Supreme Court, to subject dependents of members of the armed forces overseas to the jurisdiction of courts-martial for capital offenses, and the like questioned power in cases of non-capital offenses. Of course, where matters of life or death are involved, the facts must be scrutinized closely and the decision carefully weighed, but when arrived at, the applicable principle applies alike in all similar cases.

Believing myself bound by the decision of the Supreme Court in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger,* I will grant the writ prayed for and discharge Joanna S. Dial from custody.

BEN MOORE,
United States District Judge.

SEPTEMBER 6, 1958.

Habeas Corpus No. 2145

UNITED STATES OF AMERICA ON THE RELATION OF ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, RESPONDENT

This matter having been regularly brought on the 5th day of September, 1958, for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the Court ordered that the said Mrs. Joanna S. Dial in whose behalf the Writ of Habeas Corpus was sued out, is illegally restrained of her liberty, as alleged in the petition herein, and that she be and she is hereby discharged from the custody of Nina Kinsella, Warden of the Federal Reformatory for Women, at Alderson, West Virginia, from whom she has been produced.

Enter: Sept. 8, 1958.

BEN MOORE,
United States District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1958

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 22

NINA KINSELLA, WARDEN, APPELLANT

v.

UNITED STATES OF AMERICA EX REL. ALBERTA SINGLETON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the District Court (R. 63–66) is reported at 164 F. Supp. 707.

JURISDICTION

The judgment of the District Court was entered on September 8, 1958. Probable jurisdiction was noted by this Court on February 24, 1959 (R. 71). 359 U.S. 903. The jurisdiction of this Court rests on 28 U.S.C. 1252.

QUESTION PRESENTED

Whether Article 2(11) of the Uniform Code of Military Justice is constitutional as applied to a

serviceman's spouse who accompanied her husband to Germany and who was convicted by court-martial for a non-capital offense committed in that country.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the Constitution are involved:

> Article I, Section 8. The Congress shall have Power * * *
>
> Clause 14. To make Rules for the Government and Regulation of the land and naval Forces;
>
> * * * * *
>
> Clause 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.
>
> * * * * *
>
> Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The pertinent portions of Article 2 of the Uniform Code of Military Justice as codified in 70A Stat. 37, 10 U.S. Code 802, provide as follows:

> Article 2. *Persons subject to this chapter.* The following persons are subject to this chapter:
>
> * * * * *
>
> (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.
>
> * * * * *

The Act of August 10, 1956, c. 1041, Section 49, 70A Stat. 640, provides:[1]

> * * * * *
>
> (d) If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

STATEMENT

Mrs. Dial is a citizen of the United States and the wife of Specialist Second Class James W. Dial, United States Army. She accompanied her husband to

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[1] This severability provision was not codified in Title 10. However, it was part of Public Law 1028, which was enacted into positive law as Title 10. It can be found in 10 U.S.C. p. 958.

his military station in Germany. In June 1957, while in Germany, Mrs. Dial and her husband were charged with involuntary manslaughter arising out of the death of their one-year old infant son, who had died as a result of severe beatings administered by the parents over a period of several weeks (R. 36–37). Involuntary manslaughter is an offense under Article 119 of the Uniform Code of Military Justice, 10 U.S.C. 919. Charges were preferred against Specialist and Mrs. Dial under Article 119, the charges were referred to trial (R. 38), and each of the accused entered a plea of guilty (R. 38, 39). Mrs. Dial, although pleading guilty to the charges, objected to the jurisdiction of the court-martial (R. 38, 53). On the basis of these pleas, the court-martial found Mrs. Dial and her husband guilty of involuntary manslaughter as charged (R. 41). Mrs. Dial was sentenced to confinement at hard labor for three years (R. 45). Her husband received a three-year sentence and a dishonorable discharge (R. 45).

The convening authority approved the sentence of the court-martial (R. 47) and forwarded the record of trial to the Judge Advocate General for review by a Board of Review. On February 14, 1958, the Board of Review approved the findings and sentences as to both Mrs. Dial and her husband (R. 16–22). Pursuant to the provisions of Art. 67(b)(2) of the Uniform Code of Military Justice, the question of jurisdiction over Mrs. Dial under Article 2(11) of the Code was certified to the United States Court of Mili-

tary Appeals (R. 23–24). That court sustained the jurisdiction of the court-martial under Article 2(11) (R. 60–61).

On August 12, 1958, while Mrs. Dial was serving her sentence at the Federal Reformatory for Women, Alderson, West Virginia, a petition for a writ of habeas corpus was filed in her behalf in the District Court by Alberta Singleton, her mother (R. 2–4).

After a hearing, the District Court, on September 8, 1958, entered an order granting the writ of habeas corpus "believing [itself] bound by the decision of the Supreme Court in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger*" (R. 62–66, 68). Notice of appeal was filed on October 8, 1958 (R. 69), and this Court noted probable jurisdiction on February 24, 1959 (R. 71).

SUMMARY OF ARGUMENT

A. This case is similar to *Reid* v. *Covert*, 354 U.S. 1, in that the issue here is the amenability to court-martial jurisdiction of a civilian dependent who was accompanying her soldier husband overseas when she committed an act of violence. But, unlike *Covert*, the offense here was not capital. In the light of the decision in that case—which was strictly limited by the concurring Justices to the question of court-martial jurisdiction over dependents who commit capital offenses—the District Court clearly erred in its holding that the issue here was foreclosed by *Covert*.

B. The *Covert* decision can, and should, be limited to capital offenses by dependents. As was emphasized by Mr. Justice Frankfurter and Mr. Justice

Harlan, where life is at stake a different standard is frequently applied. If the issue is "analogous, ultimately, to issues of due process" (354 U.S. at 44, 53 and 75), then there must occur that balancing of interests which is characteristic of due process problems. In any such balancing, the fact of whether or not life is at stake must weigh heavily. In our view, the Court should here reexamine, in the light of the non-capital nature of this case, all of the ingredients that went into the decision in *Covert:* the historical material; the special status of dependents in the military communities abroad; the alternatives to court-martial jurisdiction; the practicalities of the international situation; the morale of the armed forces overseas; and the need for prompt and on-the-spot American criminal jurisdiction. These are considered at length in our brief in No. 21, *McElroy* v. *Guagliardo.* Upon such a re-balancing, the non-capital nature of the offense in this case should be decisive in favor of the validity of court-martial jurisdiction.

C. In particular, the historical materials from the period of the Revolutionary War and colonial times show, we believe, that accompanying wives were regarded as retainers to the camp, subject to court-martial at least for non-capital crimes.

ARGUMENT

THE RULE ESTABLISHED IN *REID* V. *COVERT* SHOULD NOT BE EXTENDED TO COVER NON-CAPITAL CASES OF DEPENDENTS TRIED OVERSEAS BY COURT-MARTIAL

A. THE ISSUE IS NOT FORECLOSED BY THE *COVERT* DECISION

As in *Reid* v. *Covert*, 354 U.S. 1, the person whose amenability to court-martial jurisdiction is at issue is a civilian dependent who was accompanying her serviceman-husband overseas when she committed an act of violence. This similarity in status led the District Court to consider itself bound by *Covert* and to hold Article 2(11) of the Uniform Code of Military Justice unconstitutional as applied to Mrs. Dial. Whatever may be the ultimate outcome on the merits of the question of whether one in Mrs. Dial's situation is amenable to trial by court-martial, the District Court erred in its holding that the issue was decided in *Covert*. Quite clearly, the question here was not decided by the Court in that case.

Unlike that in *Covert*, Mrs. Dial's offense was not capital. The capital nature of the crime was decisive for the outcome of the *Covert* case. Mr. Justice Frankfurter stated in his concurrence (354 U.S. at 45):

> In making this adjudication, I must emphasize that it is only the trial of civilian dependents in a capital case in time of peace that is in question. * * *

Mr. Justice Harlan, equally emphatic, concurred "on the narrow ground that where the offense is capital, Article 2(11) cannot constitutionally be applied to the

trial of civilian dependents of members of the armed forces overseas in times of peace" (354 U.S. at 65). He further commented that "So far as capital cases are concerned, I think they stand on quite a different footing than other offenses" (354 U.S. at 77). In the light of these remarks by the two concurring Justices—whose votes were necessary for the decision in *Covert*—the view of the District Court that the issue is foreclosed by *Covert* is untenable.[2]

B. THE BALANCE OF INTERESTS FAVORS COURT-MARTIAL JURISDICTION OVER DEPENDENTS IN NON-CAPITAL CASES

Our main argument on the validity of Article 2(11), as applied to the civilian contingent abroad, is set forth in the Government's brief in the companion case of *McElroy* v. *Guagliardo*, No. 21, this Term, at pp. 27–101. Though that case involves an employee, we have included in our brief all the materials and arguments (except for some historical evidence relating to dependents, discussed *infra*, pp. 15–30) bearing on the case of a dependent who is not charged capitally. It is sufficient to say here that

[2] The problem of the severability of Art. 2(11) has been discussed in a slightly different context in our brief *McElroy* v. *Guagliardo*, No. 21, this Term, pp. 18–26. The severability clause contains a provision to the effect that valid applications of Art. 2(11) are to be severed from invalid applications. It is clear that Congress desired to reach what it constitutionally could. At the very least, there is no indication in the Uniform Code or its legislative history to overcome the strong presumption of severability. Furthermore, if the *Covert* decision jeopardized the constitutionality of Art. 2(11) in each and every application because of non-severability, the narrow circumscription of the concurring opinions would hardly have been undertaken.

under modern conditions Congress has reasonably chosen to include dependents of servicemen within the military forces overseas. All the immunities and privileges enjoyed by dependents who reside with American servicemen in foreign countries have been secured on the representation that these dependents are subject to military control. Their actions can and do directly affect the military community as a whole. They are not mere tourists, but quite realistically are part of our overseas military establishments, and as such are properly held accountable under military law for non-capital offenses such as the one involved in this case.

1. We do not contend that this Court should reexamine and overturn its decision in *Covert*. It is rather our position that *Covert* must be limited by the cardinal fact that the offense involved there was capital. Such a limitation would accord with the established principle of this Court to differentiate between what may be constitutionally required in distinguishable, though related, situations. Trial of a civilian dependent overseas for a non-capital crime is significantly different from trial of such a person for a capital crime, if only for the reason that, as Mr. Justice Frankfurter pointed out in *Covert* (354 U.S. at 45), "[t]he taking of life is irrevocable."

The concept of maintaining different standards or considerations in capital cases is not at all new. It was recently expressed by Mr. Justice Frankfurter, concurring in *Griffin v. Illinois*, 351 U.S. 12, at 21:

> Since capital offenses are *sui generis*, a State may take account of the irrevocability of death

by allowing appeals in capital cases and not in others.

Because of this *sui generis* quality it is a part of our jurisprudence that the rights of an accused charged with a capital crime will be given especially painstaking and careful consideration. The responsibility of judge, prosecutor, defense counsel, jury, and appellate court is increased because the ultimate issue at stake is whether the death sentence is to be imposed. It is therefore not uncommon for additional safeguards and protections to be afforded to the accused in this type of case. In the federal system, for example, a defendant charged with a capital crime is entitled to have a list of jurors and of the witnesses who will prove the indictment, with their addresses, at least three days prior to the commencement of trial. 18 U.S.C. 3432. This right is not afforded in non-capital cases. In a capital case, the defendant cannot waive his rights to a grand jury indictment, while this right can be waived in all other cases. Rule 7(a), Federal Rules of Criminal Procedure. Bail in capital cases can be set only by a federal judge having original or appellate jurisdiction in criminal cases, while in other situations any committing magistrate can set bail. 18 U.S.C. 3141; Rule 46(a)(1), F.R.Cr.P.

In the actual trial, there are also differences in treatment of capital cases—as, for example, twice as many peremptory challenges are afforded the defendant when the death penalty is involved. Rule 24(b), F.R.Cr.P. And when an appeal is taken in

capital cases provision is made that the death sentence will be automatically stayed. Rule 38(a). Appellate courts scrutinize convictions in capital cases with special care.

In constitutional terms, capital cases have likewise been set apart for separate evaluation. Mr. Justice Frankfurter, concurring in *Covert,* indicated this concern (354 U.S. at 45–46):

> It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights.

So this Court, in construing the Due Process Clause in *Powell* v. *Alabama,* 287 U.S. 45, decided that illiterate, uneducated Negroes charged with capital crimes had to be afforded counsel for the presentation of their defense. The fact that "above all that they stood in deadly peril of their lives" led the Court to conclude that the defendants had not been afforded due process of law. 287 U.S. at 71. On the other hand, in *Betts* v. *Brady,* 316 U.S. 455, an indigent farm laborer was held not to have been denied due process under the Fourteenth Amendment when he was convicted of robbery without having been allowed court-appointed counsel. The Court again indicated that (316 U.S. at 462):

> Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. * * *

It is clear that the fact that the case was not capital had significant weight in its outcome. Subsequently, the Court pointed specifically to this distinction; in *Uveges* v. *Pennsylvania,* 335 U.S. 437, it was explained (at pp. 440–441):

> Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. * * * Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See *Betts* v. *Brady,* 316 U.S. 455, 462.

These distinctions assume special significance in the present case when it is recalled that Justices Frankfurter and Harlan, in their concurrences in *Covert,* found that the question to be decided in this type of case is "analogous, ultimately, to issues of due process" (354 U.S. at 75).[3]

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[3] Mr. Justice Harlan stated: "And so I agree with my brother Frankfurter that * * * we have before us a question analogous, ultimately, to issues of due process; one can say, in fact, that the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case" (354 U.S. at 75). And Mr. Justice Frankfurter said (p. 53): "This examination, in its similarity to analysis in terms of 'due process,' is essentially the same as that to be made in the present cases in weighing congressional power to make 'Rules for the Government and Regulation of the land and naval Forces' against the safeguards of Article III and the Fifth and Sixth Amendments." See also 354 U.S. at 44.

2. As we have just indicated, the concurring Justices in *Coveri* were of the view that the problem in these cases involves a balancing of various interests—especially the interest in effectively governing the land and naval forces in the light of the need to maintain a huge American military establishment overseas, as against the interests protected by grand jury indictment and trial by jury. In the same connection, these Justices suggested that *In re Ross*, 140 U.S. 453, and the "Insular cases"[4] stand today for the proposition that the particular setting, the practical necessities, the possible alternatives, and the actual impact of the challenged legislation must be examined before deciding whether particular power exercised over Americans overseas is valid. 354 U.S. at 50–64, 67, 74–78.[5] In *Covert*, a capital case, the balance of these factors and interests was felt to swing against the validity of court-martial jurisdiction over dependents. Since the present case is not capital, there must be a fresh evaluation and a new balancing.

Putting to one side the special weight of the capital case (outlined, *supra*, pp. 9–12, and discussed in the

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[4] *Downes* v. *Bidwell*, 182 U.S. 244; *Hawaii* v. *Mankichi*, 190 U.S. 197, *Dorr* v. *United States*, 195 U.S. 138; *Balzac* v. *Porto Rico*, 258 U.S. 298.

[5] We have shown in *Guagliardo*, Brief for the Petitioners, pp. 41–47, as we did in *Covert*, that Article I, Section 8, Clause 14 of the Constitution is properly read in conjunction with the Necessary and Proper Clause to constitute a grant of power susceptible of application under changing circumstances, and is not confined to a fixed and rigid content. See the opinion of Mr. Justice Harlan in *Covert*, 354 U.S. at 67–70.

concurring opinions in *Covert*), we are left with the factors, interests, and considerations which we set forth at length in our *Guagliardo* brief, pp. 71 *ff*. In summary, these are: (a) the need for American forces abroad, and the concomitant need that civilian dependents accompany them; (b) the special status of these dependents as integral parts of the military community for whom the commander is responsible both to this country and to the host nation; (c) the problems of discipline, affecting both the military community itself and the host country, created by the presence of large numbers of dependents (over 455,000), with the consequent need for readily available criminal jurisdiction as sanction and deterrent; (d) the international agreements under which these military communities exist and operate—which permit only American military jurisdiction abroad—and the primacy of the host nation within its own territory; (e) the unavailability and undesirability of alternatives to court-martial jurisdiction for non-capital offenses; and (f) the fairness of present-day court-martial procedures.

We also point out in *Guagliardo* that the true choice is essentially between trial in a foreign court (or no trial at all) and trial by court-martial. It is not likely that the territorial sovereigns in the many areas where our troops—and their dependent and employee complements—are stationed will permit the establishment on their soil of American civilian courts. And the inordinate difficulty and practical impossibility entailed by an attempt to try

civilian dependents in the courts in the continental United States would probably preclude all except a very few trials in this country.

Unlike *Covert,* the balance here swings, we submit, in favor of court-martial jurisdiction. The interests on the side of the accused are less, since the offense is non-capital, and the interests on the side of prompt on-the-spot American criminal jurisdiction are greater, since there is potentially involved a very substantial number of less-than-capital offenses which will be governed by the decision in this case.

C. HISTORICAL MATERIALS SUPPORT THE EXERCISE OF COURT-MARTIAL JURISDICTION IN THIS CASE

Mr. Justice Frankfurter, in *Covert,* said of the historical material adduced by the Government in its briefs in that case (354 U.S. at 64).

> What has been urged on us falls far too short of proving a well-established practice—to be deemed to be infused into the Constitution—of court-martial jurisdiction, *certainly not in capital cases,* over such civilians in time of peace [emphasis added].

In this brief, and in our brief in *McElroy* v. *Guagliardo,* No. 21, this Term, at pp. 28 *ff,* there is set forth historical material which, we believe, does indicate a "well-established practice" of court-martial jurisdiction over civilians serving with and accompanying the armed forces of England and of early America. While most of this material is not new in the present series of cases, a portion of it is. More, it must be reevaluated in light of the overriding fact that the

instant case, unlike *Covert*, does not involve a capital offense. See *supra*, pp. 8–15.

In our brief in *Guagliardo*, the historical evidence presented is concerned primarily with persons who were either employed by or serving with the military forces. This case concerns the wife of a soldier; therefore we concentrate here on the materials bearing on military jurisdiction over wives and other dependents.

As we indicate in our *Guagliardo* brief (p. 30), prior to the Declaration of Independence, the British Articles of War (those adopted in 1765) made specific provision for the court-martial of

> All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though not inlisted Soldiers * * *.[6]

A provision almost identical in language was a part of the Articles of War which governed the American army during the course of the Revolution; it was likewise a part of the Articles of War which were promulgated by the first Congress after the adoption of the Constitution, and of the Articles adopted on April 10, 1806 (2 Stat. 366).[7]

It appears that this provision in its various enactments as a part of English and American law was designed to provide for the trial by court-martial of wives who "accompanied" their husbands to the camp. The dictionary definition of "retainer" current at the time goes far to establish the point. The sole definition of retainer given in Noah Webster's *A Dictionary of*

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[6] Section XIV, Article XXIII.

[7] Article 60.

the English Language published in 1807 is "A dependent." Winthrop,[8] is even more explicit. He states that the term retainers to the camp "may be deemed to include:—1. Officer's servants; 2. Camp-followers attending the army but not in the public service." He goes on to state:

> Members of the families of soldiers or officers, commorant with the army, would be amenable as camp-followers.

The term "camp-follower," which was encompassed in the concept of retainer to the camp, was at the end of the eighteenth centry in no way limited to the modern colloquial usage of a woman of loose morals. The *Oxford English Dictionary* defined camp-follower as "a man or woman who follows or hangs on to a camp or army, without being in military service," and in fact gives, as an illustration of its use in 1810, an excerpt from a letter by Wellington referring to "The proceedings of the General Court Martial, on the trial of Edward Poole, Camp follower."[9]

A study by Walter Hart Blumenthal, entitled *Women Camp Followers of the American Revolution* (1952), reveals that in the colonial period accompanying wives were regarded as a regular part of British armed contingents. He notes (p. 45) that "there was British precedent over here of women with the forces, for a score of years before the Declaration [;] a feminine contingent was conveyed from England with

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[8] Winthrop, *Military Law and Precedents* (2d ed., Reprint 1920), 98, 99n.

[9] A New English Dictionary on Historical Principles (1893), vol. 2, p. 55.

Braddock's command at the outset of the French and Indian War." And further (p. 53):

> British camp women in the Revolution were an established institution. It was the tradition that men-at-arms needed women-at-arms. Nor did the Revolution end the British tradition. Wellington's army in the Peninsular War (1809–1814) had its share of wives and wenches—forty to sixty in every regimental following, astride donkeys, with scores, nay, hundreds, of Portuguese and Spanish helpmates picked up on the road.

That such accompanying women, including wives, were considered subject to court-martial jurisdiction appears from a letter written by one such wife on June 4, 1758, to Colonel Bouquet, from Carlisle jail where her husband was confined for cause and she likewise, for having abused the colonel. In her letter (*id.*, p. 49), she said:

> I have been a Wife 22 years and have traveled with my Husband every Place or Country the Company marcht too and have workt very hard ever since I was in the Army. I hope yr Honour will be so good as to Pardon me this onct time that I may go with my Poor Husband one time more to carry him and my good Officers water in ye Hottest Battle as I have done before. Yr unfortunate Petitioner and Humble Servant, Martha May.

Women were sent over with British troops during the American Revolution, including the early period before the Declaration of Independence when, from the British point of view at least, there was no war,

but merely disorder in the colonies. General Sir William Howe's Orderly Book for the period of June 17, 1775, to May 26, 1776, shows that the British treated the women as a regular part of the army. Orders were regularly issued to account for the women so that provisions could be issued for them.[10] Their

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[10] E. g.:

"*Camp on the Heights of Charleston—6th July 1775* [pp. 34–35]

* * * * *

"A List of the Names and a return of the Numbers of Women and Children in every Corps Encamp'd here to be given in immediately specifying those present with the Corps that the issuing their provisions may be properly regulated, and the quantity ascertained."

"*General Orders Dated Head Quarters—Boston 6th July 1775* [p. 35]

"A return of every Officer, Serjeant, Drummer, Rank and file of each Corps, As also a List of the Names of the Women Children and all other persons followers of the Army, not Soldiers, for whom the Corps draw provisions to be given to the Dy Adjutt Genl on Wednesday Morning next."

"*Head Qrs Wednesday, 13th March 1776* [p. 235]

* * * * *

"Each Corps to apply immediately at No 16 on the long Wharf for a Barrel of Salt fish, to be divided among the Men & Women."

"*Hd Qrs Thursday 2nd May 1776* [p. 262]

"Six Women pr Compy will be allowed to embark with each Rgt, the Commanding Officers will be responsible that no more Women are received on board nor any Children.

"Provisions will be allowed at the rate of half a Ration for each Woman, & a Quarter for each Child that is left behind."

"*Hd Qrs Halifax Tuesday 21st May 1776* [p. 287]

* * * * *

"The Commanding Officers of Regimt & Corps are desired to send returns immediately to the Deputy Qr Mastr Genl of the Number of Officers men & Women that they allot to their respective Transports in order that provisions may be put on Board accordingly."

conduct was regulated.[11] Some form of punishment was also contemplated, often consisting of dismissal from camp,[12] but sometimes taking more drastic form. Mr. Blumenthal's book (p. 42) reports that:

> The wife of a private who was detected as a receiver of stolen goods was sentenced to "one hundred lashes on her bare back, with a cat-o'nine tails, at the cart's tail, in different portions of the most conspicuous parts of the town, and to be imprisoned three months."

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[11] E.g.:

"*Head Quarters Boston 18th Novr 1775* [p. 143]

* * * * *

"Women belonging to the Army will not be Allowed to be present at any Fires that may happen."

"*Head Qrs Boston, 30th Decr 1775* [p. 183]

* * * * *

"* * * The Soldiers Wives are not to lodge out of their respective districts."

"*Camp on the Heights of Charlestown—23rd Sepr 1775* [p. 95]

* * * * *

"No woman to be allowed to pass the ferry without a pass from the Commanding Officer of the Corps to which they belong, and the pass is to be taken from them by the Officer of the ferry Guard when they return from Boston."

"*Camp on the Heights of Charlestown—Wednesday 5th July 1775* [p. 33] * * * *After Order 5 oClock.*

"Some of the Soldiers wives having brought spirituous Liquors from Boston to this Camp, contrary to Orders; the permission for their passing from thence, hither, is stopt, until further Orders."

[12] E.g.:

"*Camp on the Heights of Charlestown—Thursday 22d June 1775* [p. 13]

And for a later period, General Burgoyne's Orderly Book (p. 24) reports the following:

> CAMP NEAR TICONDEROGA,
> 3d JULY, 1777.
> Countersign, *Dover.*
>
> Parole, *St. Honora.*
>
> Brigadier Generals and Brigade Majors as yesterday.
>
> Field Officer Picquet British, Lieut. Col. *Hill.*
>
> Field Officer Picquet German, Major *Paffem.*
>
> It being apparent that Liquor is sold or given to the Savages, notwithstanding the positive and repeated Orders to the Contrary, the Commanding Officers are to assembly the Sutlers and Women of the respective Regiments, and

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* * * * *

"The Commanding Officers will be answerable the Number of Women with their respective Corps do's not Exceed four p[er] Company agreeable to the General Orders of the 20th that those be the best behaved and bring or keep no Children with them. If any Women are found in Camp Contrary to this Order they will be dismiss'd and sent Prisoners to Boston with Positive Directions not to be permitted to return from thence to this Camp."

"*Head Qrs Boston Sunday 10th March 1776—Morning Orders ½ past 8 O'Clock 11th March 1776* [p. 232]

* * * * *

"Any Woman belonging to the Army, that may be found in Town after One O'Clock, will be taken up & sent to the Provost & will be left behind."

"*Head Quarters Boston 14th Octr 1775* [p. 111]

* * * * *

"Women belonging to the Army *convicted* of selling Spirituous Liquors will be confined in the Provost till their is an oppy of sending them away from hence." (emphasis added)

> inform them that the first person found guilty of disobedience shall instantly have their liquors and sutling stores destroyed and turned out of Camp, besides receiving such Corporal *Punishment* as a Court Martial shall inflict. * * *

Other British cases of the trial of women as retainers to the camp include the general court-martial in December, 1775, in Boston, of Anne Hennesy, wife of a private, who was charged with her husband of having broken into a house and stolen property. Both were found not guilty.[13] A general court-martial sitting in Quebec, October 26 to November 1, 1760, tried Elinor Russell, wife of a soldier of the 35th Regiment, for receiving and buying stolen goods. She was found not guilty.[14] In March 1761, a general court-martial held in Montreal tried Katherine David, "spouse of Mr. Bove," and Etien, a Negro woman, for receiving stolen property. It should be noted that these last two cases occurred in peace time, the French and Indian War having ended and the French having signed terms of capitulation on September 8, 1760.

At Freehold, New Jersey, on June 27, 1778, Elizabeth Clarke, a "follower of the army," was found guilty by a general court-martial of violation of the Articles of War for plundering and destroying the house of a farmer, and sentenced to 100 lashes "and then to be drummed out of the Army." The same

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[13] *General Courts Martial for Marching Regiments*, 1775 to 1776, folio 202, Public Record Office, London.

[14] These and the immediately succeeding cases were obtained from unpublished documents in the Public Record Office, London.

general court-martial found Mary Colethate, another follower of the army, not guilty of the same offense. Two other women were tried by a general court-martial sitting on Long Island in July 1778, and found not guilty. One was Mary Jefferies, "follower of the Army," tried for persuading a soldier to desert. The other was Lucretia Ellis, described as a nurse in the regimental hospital, who was tried for murder.

This British practice was carried into the American armies during the revolution. Mr. Blumenthal's book reports (pp. 60-61):

> Among American militia and the Continental line there were far fewer camp wives or other women than with the enemy. Many of the colonial soldiery, whether seasoned volunteers or raw levies, though married were footloose or homeless as a consequence of localities occupied by the British; hence uprooted wives often went along. Efforts were constantly made to curb irregularities and to keep down strumpet stragglers. The basic reasons for permitting camp women were not only that the practice prevailed among all armies, and the knowledge that quotas of women were with the British, but the inescapable fact that inroads of the redcoats had rendered patriot flight necessary in several areas, together with the natural desire of the women to care for their men—an impulse recognized by the American military leaders.

And further (p. 72):

> As the war dragged on, the army was welded, and the recognition of camp women as a collateral part of the forces became imperative.

> A routine grew up in this as in other matters. That discipline was instilled into the new Continental Army is seen by the orders. In the 2nd and 4th New York Regiments there were more than three hundred courts-martial cases from 1778 to 1783.

That General Washington considered the accompanying women subject to court-martial jurisdiction is clear from the following order dealing with the constantly troubling problem of transportation (*Writings of Washington*, Vol. 22, p. 233): [15]

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[15] The problems of transportation are illustrated by the following (Vol. 15, p. 240):

"*General Orders—Head Quarters, Smith's Tavern, Monday, June 7, 1779*

* * * * *

* * * It was too observant also that the heavy baggage of the Army has been very little, if anything diminished, and that the pernicious practice of suffering the women to incumber the Waggons still continues notwithstanding every former prohibition. The General recommends these matters to the particular attention of the officers commanding brigades and that they will take the most vigorous and effectual measures to prevent the like abuses hereafter."

Vol. 9, p. 139:

"*General Orders—Head Quarters, Wilmington, August 27, 1777*

* * * * *

* * * the women are expressly forbid any longer, under any license at all, to ride in the waggons, and the officers earnestly called upon to permit no more than are absolutely necessary, and such as are actually useful, to follow the army."

General Orders—Head Quarters, New Windsor, Tuesday, June 19, 1781

* * * * *

No Women will be suffered to ride in waggons or walk in the ranks this Campaign unless there are very particular reasons for it, of which the General Officer or officer commanding the Division or brigade to which they belong is to be the judge; a written permission only will avail; without this the officers of the day or police are not only authorized to turn them out, but requested to inflict instant punishment upon those who shall be found transgressors of this order.

The Valley Forge Orderly Book of General George Weedon of the Continental Army under Command of Genl. George Washington, in the Campaign of 1777–8, details that on January 29, 1778, one Mary Johnson, wife of a soldier, was tried by court-martial and upon conviction received a sentence of 100 lashes and was drummed out of camp. On the same date Ann McIntosh, wife of another soldier, was also tried by court-martial and was acquitted. pp. 215–216. Again, on February 4, 1778, General Washington issued a General Order relating to women coming to the camp from Philadelphia for the purpose of enticing soldiers to desert. This order recites in part:

* * * if any of them appear under peculiar circumstances of Suspicion they are to be

brought to immediate trial and punishment if found guilty. [*ibid* at p. 221] [16]

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[16] Washington clearly regarded accompanying women as a necessary, if not always wholly desirable, part of his forces. Thus in a letter to the Superintendent of Finance dated January 29, 1783 (v. 26, *Writings*, pp. 78–79), he explained what was evidently regarded as excess expenditure for women:

> dear Sir: As I never saw, nor never heard of the resolve of Congress spoken of the Secretary at War (as mentioned in your letter of the 21st Instt.) and conceive it a right inherent, with Command to limit (as circumstances and the nature of Service may require) the proportion of Women to the Men of an Army I confess I felt myself hurt by the interference of other departments without any previous notice or communication of sentiments with me on the Subject.
>
> * * * * *
>
> It will appear, by having recurrence to my Orderly Book, that an oeconomical attention to the public interest, in this case, has not been wanting; but that upon every return of the number of Women called for (at different periods) when compared with the tofality of the Army, it has been found, that no general Rule consistent with American, or British Customs, could be established that would not encrease the agregate amount of the Issues and therefore that it was better to submit to a surplusage in some Corps than to render the expence greater and the evil more extensive by adopting a limitation whh. would pervade the whole Army. especially too, as some of those Corps were, and still are, under particular circumstances. for instance the Regiments of York, which, in part, are composed of Long Islanders and others who fled with their families when the enemy obtained possession of those places and have no other means of Subsistence. The Cries of these Women; the sufferings of their Children, and the complaints of the Husbands would admit of no alternative. The latter with too much justice remarked "If *pay* is withheld from *us*, and *Provisions* from our *Wives* and *Children* we must all starve together; or commit Acts which may involve us in ruin." Our Wives add they "could earn their

British records for the period following the American Revolution likewise show the exercise of jurisdiction over women camp-followers in the colonies (*i.e.*, "in the field"). Martha Stevens, "camp follower", was tried by general court martial at Saugor, India, for the wilful murder of her reputed husband,

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Rations, but the Soldier, nay the Officer, for whom they Wash has naught to pay them." In a word. I was obliged to give Provisions to the extra Women in these Regiments, or loose by Desertion, perhaps to the Enemy, some of the oldest and best Soldiers in the Service. * * * And in a letter to Major General Knox, dated March 8, 1783, he said (v. 26, p. 199):

> Dear Sir; The Women of the New York Regt. of Artillery have applied to me on the Subject of allowing them and their Children Provisions.
>
> The number of Women and Children in the New York Regiments of Infantry before the new System of Issues took place obliged me, either to depart from that System and allow them provision or by driving them from the Army risk the loss of a number of Men, who very probably would have followed their Wives. I preferred the former and accordingly directed that the whole of the Women and Children then with the Troops, should be allowed to draw as usual. * * *

The report of a meeting of the Board of General Officers on June 12, 1781 (v. 22, pp. 202–203) contains the following:

> The Commander in Chief urged to the Board the necessity of oeconomising Provisions, and recommended to the Generals, particularly the Brigadiers, the Necessity of inspecting the Returns made by their Commissaries upon every drawing Day, * * *. He also desired them to take the following Matters into Consideration and report upon them accordingly.
>
> * * * * *
>
> 4th: The proportion of Women which ought to be allowed to any given Number of Men, and to whom Rations shall be allowed.

Sergeant James Stevens, by stabbing him with a knife. The crime took place on November 11, 1824, with the trial on February 8, 1825. The court found her not guilty of murder but guilty of manslaughter and sentenced her to ten months' imprisonment. The sentence was approved by General Edward Paget, Commander-in-Chief in India and was ordered executed by James Nicol, Adjutant General of the Army.[17]

Less than a year later, a general court-martial was assembled at Merut on August 6, 1825, to try Hannah Fitchit, a British subject and camp follower and the reputed wife of Private Joseph Fitchit. She was tried for the murder of Private Alexander Laird by stabbing him with a bayonet. She was found guilty of manslaughter and sentenced to prison for two years. The sentence was approved, but on review was mitigated to three months' imprisonment.[18]

In 1831, there was an instance in Delhi in which court-martial of an officer's wife was considered. The records show:

> The resignation had been accepted a month prior to the above transaction; otherwise both Lieutenant R. ——— and Mrs. R. ——— might have been tried by a general court-martial; for doubtless the wife of an officer or soldier is a camp-follower.[19]

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[17] Hough, *Precedents in Military Law* (1855), p. 401.

[18] Hough, *op. cit., supra.*, p. 402.

[19] Hough, *op. cit., supra*, pp. 628, 630.

We do not believe that it is an answer to the question of military jurisdiction over persons who are not soldiers that the instances of such courts-martial reported during or prior to the Revolutionary period are few or that the punishment imposed was minimal. We do not have a recording of all cases where the power was exercised. (Indeed, the instances of courts-martial of soldiers which are recorded are not overwhelming in number). And when it is recalled how carefully the Continental Congress surveyed the operations of the Continental Army, it is most unlikely that the members would have permitted any abrogation of freedom by the Army through the exercise of improper court-martial jurisdiction. Moreover, the punishment inflicted cannot be dismissed as being minimal. Even banishment from the camp, insofar as it curtailed the means of livelihood and imputed dishonor, could be real and severe.[20] The severity or lightness of punishment is tested by its effect on the recipient. This was aptly illustrated during the course of the debates in the Constitutional Conventional where Delegate Ellsworth of Connecticut, in discussing the authority to punish the militia, made the point that:

---

[20] During the Revolution and thereafter, the sentence to "be drummed out of camp" was considered an ignominious punishment, equivalent to the pillory and flogging. Ganoe, *The History of the United States Army* (Rev. ed. 1942), pp. 16-17. The banishment of a wife from the camp was most severe because it severed her from her husband, her home and her livelihood, and often placed her at the mercy of an alien and, frequently, enemy countryside.

> Three or four shillings as a penalty will enforce obedience better in New England than forty lashes in some other places. [Prescott, *Drafting the Federal Constitution* (1941), p. 519.]

Nor do we believe that one can dispose of this historical evidence that women accompanying their husbands were treated as an integral part of the army by the fact that the accompanying most often took place in time of hostilities. The bulk of the available evidence relates to times of hostility because that is the period when the problem would naturally become most troublesome, and also because the historical records for such periods have been collected. But as shown, *supra*, pp. 18 *ff*, 22, 27–28, the historical materials also appear to show that women were subject to military jurisdiction in times of peace as well, and there does not appear to have been any difference in the principle. See also the letter from Walter Hart Blumenthal, dated February 14, 1957, appended to the Reply Brief for Appellant and Petitioner in *Covert*, at pp. 82–85 (concerning military jurisdiction over women camp-followers in time of peace in the period before the American Revolution).

We submit, in short, that there is a solid historical basis for the exercise of court-martial jurisdiction over dependents of military personnel, and that the exigencies of the present situation are such that today, perhaps even more than in the past, such jurisdiction is "necessary and proper" to the carrying out of the legitimate functions of government.

CONCLUSION

For the foregoing reasons and those set forth in the Brief for the Petitioners in No. 21, *McElroy* v. *Guagliardo*, it is respectfully submitted that the judgment below should be reversed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 22

NINA KINSELLA, WARDEN,

Appellant,

vs.

UNITED STATES OF AMERICA
ex Rel. ALBERTA SINGLETON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR THE APPELLEE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 22

NINA KINSELLA, WARDEN,

Appellant,

vs.

UNITED STATES OF AMERICA
EX REL. ALBERTA SINGLETON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR THE APPELLEE

Opinions Below

The opinion of the United States District Court releasing Mrs. Dial from custody (R. 63-66) is reported at 164 F. Supp. 707. The opinion of the Court of Military Appeals sustaining military jurisdiction over Mrs. Dial (R. 60-61) is reported at 9 USCMA 541 and 26 CMR 321.[1]

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[1] A complete glossary of all military law abbreviations used in this brief appears in Appendix A, *infra*, pp. 111-112.

Jurisdiction

The judgment of the District Court (R. 68) was entered on September 8, 1958. Appellant's notice of appeal (R. 69-70) was filed on October 8, 1958. This Court noted probable jurisdiction on February 24, 1959 (R. 71) and permitted appellee to proceed *in forma pauperis* (359 U.S. 903). The jurisdiction of this Court rests on 28 U.S.C. §1252.

Question Presented

Whether a civilian woman, the dependent wife of an American soldier stationed overseas, may constitutionally be tried by court-martial in time of peace for a non-capital offense.

Constitutional Provisions and Statutes Involved

The relevant constitutional provisions appear sufficiently at p. 2 of the appellant's brief herein. The statutes particularly involved in this case are set forth in Appendix B, *infra*, pp. 113-115.

Statement

Mrs. Joanna S. Dial lived with her husband, Specialist 2d Class James W. Dial, a soldier in a tank battalion of the Army, and their three children, in Government quarters in the Fallenberg Housing Area, Baumholder, Germany (R. 48).

Their second child, James W. Dial, Jr., about 14 months old (R. 48), presented a temper and feeding problem, particularly after the birth of their youngest child in March 1957 (R. 26-27, 48).

In consequence of a series of beatings administered over a period of several weeks by both its parents, James W.

Dial, Jr., died on May 21, 1957 (R. 48-49), whereupon both were charged with two specifications of unpremeditated murder in violation of Art. 118(2), UCMJ; the first specification alleged murder by beating, the second murder through failure to seek and provide adequate medical care (R. 51-52, 54-55). Both specifications alleged that the offenses were jointly committed (*id.*).

Thereafter, Joanna S. Dial was psychiatrically evaluated (R. 26-28), and though she was found legally responsible and competent to understand the proceedings against her (R. 28), the Army psychiatrist who examined her noted that her I.Q. of 90 "places her on the border line of low average and dull normal intelligence" (R. 27), and concluded with the following diagnostic impression (R. 28):

> "Emotional instability reaction (Immaturity reaction) with marked hostility in a rather primitive restricted and egocentric person of low average intelligence, and of poor social educational background."

Subsequently, both accused offered to plead guilty to the lesser included offense of involuntary manslaughter in violation of Art. 119(b), UCMJ, if the original charges were withdrawn (R. 53, 56). That offer in the case of Joanna Dial specifically stated (R. 53):

> "This offer is not to be construed as consent on my part to the exercise of jurisdiction over me by the military court."

Both offers were accepted by the convening authority, *viz.*, the Commanding General, 2d Armored Division (R. 52, 56).

Meanwhile, on June 29, 1957, new charges alleging involuntary manslaughter in violation of Art. 119, UCMJ, had been preferred, each containing a single specification (R. 34-37).

Both accused were tried together on July 29, 1957 (R. 29-46) on those new charges.[2]

Specialist Dial pleaded guilty (R. 38). Counsel for Mrs. Dial moved for dismissal of the charges against her "on the ground that the court-martial has no jurisdiction over the person of a civilian for trial on charges of this nature" (R. 38), but tendered no argument (R. 38-39), whereupon the motion was denied (R. 39). Mrs. Dial then likewise pleaded guilty (R. 39).

An out-of-court hearing followed before the law officer, who satisfied himself that both pleas of guilty had been understandingly entered (R. 39; App. Ex. 3, R. 57-59). The law officer then, in open court, accepted the plea of guilty of each accused (R. 39), and both the prosecution and the two accused rested (R. 39-40). The court thereupon found both accused guilty of the specification and charge as to each (R. 41).

In the proceedings to determine the sentence to be imposed, the prosecution offered a stipulation, signed by both accused, that set out in detail the manner in which James W. Dial, Jr., had met his death (R. 42-43, 48-50).

Neither accused chose to present any matter in mitigation or extenuation (R. 43-44), whereupon the court, after ten minutes' deliberation, sentenced Specialist Dial to a dishonorable discharge, total forfeitures, and three years' confinement at hard labor, and Mrs. Dial to three years of confinement at hard labor without more (R. 45). This was, in each instance, the maximum permissible sentence for the offense (R. 44; MCM, U.S., 1951, p. 223).

On September 9, 1957, the convening authority approved both sentences (R. 47). Mrs. Dial was ordered confined

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[2] The Statement of the case in the Government's brief, pp. 3-5, fails to disclose that, prior to their trial for manslaughter, both Mrs. Dial and her soldier husband had been charged with murder.

in the Federal Reformatory for Women at Alderson, W. Va. (R. 47), Specialist Dial in the United States Army Branch Disciplinary Barracks, New Cumberland, Pa. (R. 47). For the General Court-Martial Orders in the two cases, see R. 10-14.

Thereafter, on February 14, 1958, an Army Board of Review, acting pursuant to Art. 66, UCMJ, affirmed both convictions (R. 16-22). The Board rejected the contention of appellate counsel for Mrs. Dial that the court-martial did not have jurisdiction over her (R. 17), on the ground (R. 22) that:

> "the necessity for military jurisdiction over dependents charged with non-capital offenses is sufficient to overcome the requirements of Article III and the Fifth and Sixth Amendments."

On March 17, 1958, The Judge Advocate General of the Army certified the jurisdictional issue to the Court of Military Appeals under Art. 67(b)(2), UCMJ (R. 23-24).

Subsequently, on August 12, 1958, Alberta Singleton, mother of Joanna S. Dial, filed a petition for habeas corpus on her daughter's behalf in the federal court for Southern West Virginia, on the ground that the latter's trial by court-martial had involved a violation of the Constitution (R. 2-4). The writ issued on the same day (R. 1, 62), returnable September 5, 1958, and the appellant warden then made a return, asserting the validity of Mrs. Dial's trial by court-martial, and alleging that, in view of the pendency of her case before the Court of Military Appeals, she had "not exhausted her remedies within the military appellate structure" (R. 5-25).[3]

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[3] The return showed that the execution of Specialist Dial's dishonorable discharge had been suspended, and that he had been transferred to the Disciplinary Barracks at Lompoc, California (R. 6, 15).

Following issuance of the writ of habeas corpus, but before hearing thereon, the Court of Military Appeals sustained the military jurisdiction (R. 60-61; 9 USCMA 541, 26 CMR 321). It said (R. 61):

> "All that remains is to determine whether dependents of military personnel in foreign lands, who are associated with the military in every way but for the performance of military duties, can constitutionally be considered by Congress as part of the armed forces for the purpose of regulating their conduct on the same basis as those in uniform. In our opinion, Congress has that power."

Eleven days later, the United States District Court, Moore, *J.*, held the precise contrary, and ordered Mrs. Dial discharged from custody (R. 63-68). Judge Moore followed an earlier decision of his involving the trial of a dependent by court-martial for a non-capital offense, *U. S. ex rel. Louise Smith* v. *Kinsella,* U.S.D.C., S.D.W.Va., H.C. No. 1963 (R. 63, 64, 67), essentially because he conceived himself bound by *Reid* v. *Covert,* 354 U.S. 1 (in which his own ruling below, *United States* v. *Kinsella,* 137 F. Supp. 806, had been reversed). Judge Moore said (R. 65-66):

> "Moreover, I can think of no logical distinction, insofar as the constitutional power of Congress is concerned, between its asserted power, denied by the Supreme Court, to subject dependents of members of the armed forces overseas to the jurisdiction of courts-martial for capital offenses, and the like questioned power in cases of non-capital offenses. Of course, where matters of life or death are involved, the facts must be scrutinized closely and the decision carefully weighed; but when arrived at, the applicable principle applies alike in all similar cases."

The warden appealed (R. 69-70). This Court noted probable jurisdiction (R. 71) and allowed Mrs. Singleton to proceed *in forma pauperis* on her daughter's behalf (359 U.S. 903).

Summary of Argument

I. If, as the District of Columbia Circuit held in *Guagliardo* (No. 21), Art. 2(11), UCMJ, is not separable, then there is no need to go farther. But no such easy solution of this or of the related cases is possible.

A. Although the four cases now here involve different separability clauses, every point they present but one is literally separable. Art. 2(11) deals with civilians in three categories; each class can be separately dealt with, and should be so dealt with in view of the separability provision. The distinction between capital and non-capital offenses involves different applications, hence this case and No. 21 can and should be considered as separable from *Reid* v. *Covert*.

B. Even the capital vs. non-capital distinction in *Wilson* (No. 37) can be separately considered, even though not literally affected by the later and broader separability provision, because Congress by amending Art. 2(11) in 1956 and 1959 has fairly indicated an intention that all of the balance of that paragraph should stand.

C. Under the standard of *Dorchy* v. *Kansas*, 264 U.S. 286, 290, all of the portions of Art. 2(11) not affected by *Reid* v. *Covert*, 354 U.S. 1, can and should stand alone with the result that the basic constitutional issues now presented must be faced.

II. The prerequisite to the exercise of military jurisdiction is that the accused have a military status, and therefore, with a narrow wartime exception inapplicable here, no civilian can constitutionally be tried by court-martial.

A. In view of the Government's professed willingness to accept *Reid* v. *Covert*, 354 U.S. 1, its arguments in this case should be restricted to the narrow issue of capital versus non-capital offenses. The cited holding forecloses a whole collection of subsidiary arguments still advanced by the Government, for there the Court, as a Court, did authoritatively construe Clause 14 by holding that civilian dependents charged with capital offenses fell outside the scope of that provision.

B. The exception to the rule of status is the narrow class of civilians who in time of war are "in the field," i.e., at a time when and at a place where military operations are carried on. Art. 2(10), UCMJ; *Toth* v. *Quarles*, 350 U.S. 11, 15; *Reid* v. *Covert*, 354 U.S. 1, 22-23.

The clause "in the field," which has been in every American military code since 1775, was uniformly interpreted by the Attorney General and by The Judge Advocate General of the Army not to warrant the exercise of military jurisdiction over any civilians in time of peace, or, in time of war, over any civilians not in the theater of actual military operations. There is no basis for the Government's present attempt to excise this vital limitation by omitting to notice any of the many published official rulings in which it was stated and repeated, in all of which military jurisdiction over civilians was narrowly and rigidly confined.

C. Military jurisdiction depends on status and not on the nature of the offense charged, hence Winthrop's state-

ments that no statute could constitutionally subject any civilian to military law in time of peace, and that there was no third class that was part civil and part military.

1. The military is a separate community from that of the civilian, *Orloff* v. *Willoughby*, 345 U.S. 83, 94, and hence entrance therein involves such a complex of new relationships that a new and different status results. *In re Grimley*, 137 U.S. 147; *White* v. *United States*, 270 U.S. 175; *United States* v. *Williams*, 302 U.S. 46; *United States* v. *Standard Oil Co.*, 332 U.S. 301. The separateness of the military status is emphasized by the circumstance that military law has its own system of courts under a power wholly independent of that granted by Art. III. *Dynes* v. *Hoover*, 20 How. 65, 79. And this Court has rejected the notion that a civilian who remains a civilian "crosses the vast gulf between civil and military jurisdiction." *Gibson* v. *United States*, 329 U.S. 338.

2. A differentiation between capital and non-capital offenses is appropriate only in a due process setting, involving the exercise of an admitted power, but entirely inappropriate here, where the question is whether a particular power exists at all.

Examples of the first situation may be found in *Wilson* v. *New*, 243 U.S. 332, in *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, and in the cases that involve the exercise of admitted jurisdiction in varying contexts of capital or non-capital. Cf. *Powell* v. *Alabama*, 287 U.S. 45, with *Betts* v. *Brady*, 316 U.S. 455, and *Gibbs* v. *Burke*, 337 U.S. 773. But that approach is unavailing and inappropriate where the very existence of an asserted jurisdiction is in issue. Indeed, the due process approach in the present connection is simply an effort to revive the now rejected fallacy of the 1956 opinions in *Covert-Krueger*, "that under the

Constitution the mere absence of a prohibition against an asserted power, plus the abstract reasonableness of its use, is enough to establish the existence of the power." 354 U.S. at 66.

D. The purported distinction between capital and non-capital offenses as a criterion of military jurisdiction is untenable on numerous grounds.

1. It cannot be found in the Constitution, for in the Fifth Amendment the line is drawn between capital and otherwise infamous crimes on the one hand, and all others, not between capital crimes and those that are non-capital. All of the crimes charged in the four cases now here were infamous in the constitutional sense.

Nor can the differentiation be found in Clause 14; it is simply impossible to define "land and naval Forces" as excluding civilian dependents charged with premeditated and felony murder, but as simultaneously including like civilians charged with unpremeditated murder and manslaughter.

2. The purported distinction is likewise untenable as a matter of history; the earlier American military codes with their severe punishments show that capital offenses were then of the essence of the law military. Those codes only distinguished between capital and non-capital offenses in a very few procedural situations, and moreover did not confer a general criminal jurisdiction such as is now asserted over dependents.

3. The purported distinction is likewise untenable in the light of earlier tests of military jurisdiction, which required a showing that the court-martial had jurisdiction of the person and subject-matter. E.g., *Carter* v. *Roberts*,

177 U.S. 496, 498. The Government's purported test would make military jurisdiction over the person depend on the nature of the subject-matter.

4. The distinction is also untenable in the context of the UCMJ. Under §15*a*(3) of the present *Manual for Courts-Martial, Reid* v. *Covert* was a non-capital case when Mrs. Covert's petition for a writ of habeas corpus was filed. Recent military cases involving dependents make it plain that the capital vs. non-capital test is unworkable, particularly in the realm of homicide, and would moreover give to a military officer an unreviewable discretion to exercise military jurisdiction over all dependents merely by downgrading the charges against them.

5. The Government in several cases decided since *Reid* v. *Covert*, 354 U.S. 1, all of which are detailed in the argument, has acted on the assumption that the capital/non-capital jurisdictional distinction is unsound.

E. Historical materials emphasize the lack of foundation for military jurisdiction over civilian dependents in time of peace.

The Government cites only two trials of soldiers' wives by brigade court-martial in the Continental Army at Valley Forge—in time of war and in the field.

No civilian dependent is shown to have been tried by court-martial in time of peace from then until 1950. We found one instance of a non-dependent woman flogged without trial at West Point in 1795, and one instance of a non-dependent woman tried at Detroit in 1797 and drummed out of the garrison there—although there were civil magistrates in the area. Both instances were patently illegal, the latter particularly so because civilians wholly

unconnected with the Army were tried by court-martial at the same time.

From that time and in those circumstances, no woman was ever tried by court-martial until 1950. The facts accordingly utterly disprove the Government's present attempts to show a "solid basis" or a "well-established practice" of trying civilian women by court-martial in time of peace.

The English precedents do not reflect any wider jurisdiction. And, while the first American Articles of War were copied literally from the British, it is not safe to carry British analogies too far. Thus, until early in the XIX Century, the King alone could regulate the Army outside the realm; in the United States the Army was always under Congressional control, and hence in this area any analogy would be misleading.

Moreover, in 1765, the British Parliament refused to extend military jurisdiction over civilians in the North American wilderness, but instead directed the military commanders to take offenders to the nearest civil magistrate for trial. St. 5 Geo. III, c. 33, §XXV. This statute, as well as British texts, undermine the contention that British military jurisdiction was exerted over civilian dependents in areas without civil government. And all the British military trials of women in the Revolutionary period were either in time of war and "in the field" or else in occupied territory.

Not until 1957 did British military jurisdiction diverge from ours; its recent extensions do not represent American law. *Reid* v. *Covert*, 354 U.S. 1; *Toth* v. *Quarles*, 350 U.S. 11; *United States* v. *Cooke*, 336 U.S. 210.

F. On no permissible view of its scope does the Necessary and Proper clause expand Clause 14 so as to include

civilian dependents in time of peace within "land and naval Forces."

1. Even if Clause 14 is to be considered as incorporating Clause 18, the combination of both is still amended and limited by the guarantee of jury trial in the Bill of Rights. Any expansion of Clause 14 would impermissibly contract the scope of jury trial as it stood in 1789, when no American civilian dependent had ever been tried by court-martial except in time of war and in the field. And in no case has this Court ever held that Clause 18 could infringe on a single personal guarantee of the Bill of Rights.

2. In view of the widespread hostility to standing armies at the time of the adoption and ratification of the Constitution, it is plain that the Founders did not intend to confer upon the new government any power to court-martial civilian dependents in time of peace. It is to be noted in this connection that there is no historical support for the notion that what was then feared in substantial quarters was merely a standing army under executive control. The fear extended to a Congressionally controlled standing army as well. If anyone had contemplated the "expansible" concept of Clause 14 now urged by the Government, it is simply impossible that that point would have been passed over in silence by all of the articulate and imaginative anti-Federalists, as in fact it was.

It is significant that, in July 1787, Congress refused to act on a proposal to extend military jurisdiction over civilians in the Northwest Territory until such time as the civil government established by the Northwest Ordinance could begin to function.

3. "We do not write upon a clean slate." *Green* v. *United States*, 356 U.S. 165, 187; *Lee* v. *Madigan*, 358 U.S.

228, 232; *Abbate* v. *United States*, 359 U.S. 187, 190. Consequently the circumstances that, for over a century and a half after 1789, no American lawyer, military or civilian, ever invoked the Necessary and Proper Clause to support military jurisdiction over civilian dependents in time of peace, and that such an argument was first made in 1957, are well-nigh conclusive against such a basis for that jurisdiction now.

To deprive of the right to jury trial a class of civilians who had that right in 1789 is not a legitimate end, is not within the scope of the Constitution, is twice prohibited by the Constitution, and is wholly inconsistent with the spirit of the Constitution. Cf. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 421. Such, indeed, was the holding of *Toth* v. *Quarles*, 350 U.S. 11, 21-23.

III. The Government's arguments as to the alleged necessity of trying civilian dependents by court-martial and the alleged lack of acceptable alternatives are incomplete to the point of being misleading. We shall not embark on any point-by-point refutation of those contentions, but limit our reply to the obvious omissions therein.

A. The Government omits to advise the Court that, under Art. VII of the NATO agreement (and of a like arrangement with Japan), primary jurisdiction over American civilian dependents has been conceded to the foreign nations where such dependents are stationed. Thus by solemn treaty the United States has already provided for the very alternative to court-martial jurisdiction over dependents that it represents to this Court as being unacceptable.

B. The Government omits to advise the Court that at least one American civilian dependent has been turned over to the German courts for trial. That was Mrs.

Cheaves, who brought habeas corpus in the District of Columbia. There may have been many other such cases not reflected in judicial records available to the public.

C. The Government omits to explain why, after successfully persuading this Court to permit it to turn over a soldier to the Japanese authorities for trial in a Japanese Court (*Wilson* v. *Girard*, 354 U.S. 524), the possibility of similar trials in foreign courts for civilian dependents becomes an "unacceptable alternative."

D. The Government fails to explain why practical necessities require it to try by court-martial civilian dependents charged with manslaughter and why there are no acceptable alternatives for military trials of such cases, while at the same time it has been able, without demonstrable inconvenience, to withhold from trying in a military court civilian dependents charged with premeditated murder. No doubt the Government's failure to make such a demonstration lies in the impossibility of formulating it.

E. News items in reputable publications strongly suggest that the American contingents in Spain stand on a footing markedly different from that obtaining in the NATO countries, and that under the terms of an agreement with Germany recently signed but not yet ratified our servicemen and their dependents there have been made far more fully subject to German law than at any time since V-E Day in 1945. We urge the Court to call on the Government to produce those agreements under appropriate safeguards so that they may be checked against the assertions of necessity and alternatives now made.

F. The claim to exercise military jurisdiction over civilian dependents is simply a naked assertion of power: as the Board of Review said in this case, "the necessity

for military jurisdiction over dependents charged with non-capital offenses is sufficient to overcome the requirements of Article III and the Fifth and Sixth Amendments." We commend the Board members for their candor, but urge that the Court discountenance their rewriting the Constitution by the sword.

ARGUMENT

I. Fairly Construed, Article 2(11) of the Uniform Code of Military Justice Is Separable, So That the Constitutional Issue in This Case Must Be Decided.

In the *Guagliardo* case, No. 21, this Term, the Court of Appeals for the District of Columbia held that Art. 2(11), UCMJ, was not separable, so that its application to a civilian employee charged with a non-capital crime "cannot be validly carved out of the invalid general spread of that provision" (R. 41, No. 21). Judge Burger dissented on that issue (R. 42-47, No. 21).

If the District of Columbia Circuit is right in regarding Art. 2(11) as inseparable, then, plainly enough, the judgment below in the present case, which freed a civilian dependent who was convicted of a non-capital offense after trial by court-martial, must be affirmed; for, very clearly, Art. 2(11) purports to make certain specified classes of civilians subject to this system of military law enacted by the Code, and does not make any differentiation whatever of offenses, either by their inherent nature or by the punishment that conviction entails. In short, if Art. 2(11) is inseparable, there is no need to go further.

In our view, however, none of the four cases now before the Court is susceptible of such an easy solution, for a number of reasons. And, while we agree with the Government's conclusion on the issue of separability, we believe

that the analysis which follows arrives at the same result more accurately, with more reliance on the exact statutory language involved, and with less of emotional argument.

A. *Although the cases now before the Court involve two different separability clauses, the points they present are, with one exception, plainly separable even on a literal reading of those clauses.*

The Uniform Code of Military Justice was enacted by Congress as Section 1 of the Act of May 5, 1950, c. 169, 64 Stat. 107.

Section 2 of that Act (64 Stat. 145) provided:

> "Sec. 2. If any article or part thereof, as set out in section 1 of this Act, shall be held invalid, the remainder shall not be affected thereby."

This Section was not codified in the 1952 edition of the U.S. Code; it appears there in a note under Art. 1, UCMJ, then 50 U.S.C. §551, at p. 7389 of the official edition, and at p. 247 of 50 USCA (1951 printing).

The Uniform Code, thus enacted, remained in force through the end of 1956, as its reenactment, with minor and purely verbal revisions, in Chapter 47 of revised Title 10, U.S.C., did not take effect until January 1, 1957. Sec. 51 of the Act of August 10, 1956, c. 1041, 70A Stat. 1, 640; and see footnote at p. 680 of 70A Stat.

The codification of Titles 10 and 32 thus effected contained a separability clause that was more detailed. Sec. 49(d) of the Act of August 10, 1956, *supra*, is as follows:

> "(d) If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all

valid applications that are severable from the invalid applications."

It will have been observed that the second sentence of the foregoing provision—partial invalidity as to particular applications of the statute—is not included in Sec. 2 of the 1950 Act, either in language or in substance.

The Government's argument (Pet. Br., No. 21, pp. 18-26) reflects no awareness of the existence of two different separability provisions, each of differing scope.

This difference involves something more than an academic exercise in draftsmanship, since it happens that, of the quartet of courts-martial-of-civilians cases now before the Court, two are literally governed by the earlier provision, and two by the later one.

(i) In No. 21, *Guagliardo,* the offense was committed on June 20, 1957, and the relator was tried on August 28-29 and September 3-4, 1957 (R. 5, 8, 15). The 1956 separability provision therefore applies.

(ii) In the present case, No. 22, the offense was committed on May 21, 1957, and Mrs. Dial was tried on July 29, 1957 (R. 10-11, 29-45). The 1956 separability provision likewise applies.

(iii) In No. 37, *Wilson,* the offenses were committed from December 1955 to June 1956, and the relator was tried on August 21, 1956 (R. 6-8, 16-40). The 1950 separability provision accordingly was applicable.

(iv) In No. 58, *Grisham,* the offense was committed on December 6, 1952, and the relator was tried on March 20-27, 1953 (R. 9, 16). The 1950 separability clause applies to that case also.

That is to say, in *Guagliardo* and in the present case, the applicable separability provision states that all valid

parts and all valid applications of the law remain in effect, while in *Wilson* and *Gresham* the separability provision states only that all valid parts remain in effect.

Nonetheless, even when the different separability clauses are separately applied, some at least of the differences between *Reid* v. *Covert*, 354 U.S. 1, and the foregoing four cases are capable of separation.

First. Art. 2(11) speaks of persons "[1] serving with, [2] employed by, or [3] accompanying the armed forces."

Each of these clauses deals with a separate category.

Those "serving with" the armed forces are "civilians in the employment and service of the *government*," e.g., by branches of Government other than the Department of Defense and its military departments. Winthrop *134, and instances there cited; Sen. Rep. 130, 64th Cong., 1st sess., pp. 37-38.

Those "employed by" the armed forces are, very plainly, the direct employees of those forces.

Those "accompanying" include the former "retainers to the camp" (AW 63 of 1874; AW 2(d) of 1916 and 1920), i.e., the camp followers and dependents. Winthrop *132-*133; Sen. Rep. 130, 64th Cong., 1st sess., pp. 37-38; House Hearings on UCMJ, pp. 875-877.

These three clauses are plainly separable on their face.

Therefore, even under the 1950 separability provision, it is possible to separate the trials of civilian employees involved in *Guagliardo*, *Wilson*, and *Grisham*, persons "employed by" the armed forces, from the dependent wives considered in *Reid* v. *Covert*.

Second. Article 2(11) says nothing about the nature of offenses, and consequently any attempt to distinguish for

present purposes between capital and non-capital offenses involves an "application" of that Article within the sense of the 1956 separability provision.

That distinction can properly be made in *Guagliardo* and in this case, because both are subject to the later separability provision, which separates valid applications from invalid ones. That distinction cannot literally be made in respect of the offenses with which *Wilson* was charged, because his case arose under the 1950 separability provision; and of course the distinction does not arise in *Grisham*, since he was tried for a capital offense.

Consequently, on a literal reading of the applicable severability provisions, every aspect in which each of the four cases now under consideration differs from *Reid* v. *Covert* can be considered separately, except one, and that is the non-capital aspect of *Wilson*.

B. *Read in the light of other legislation, both separability clauses must be given the same broad effect, so that every application of Article 2(11) is separable.*

It does not follow, however, that even the non-capital/capital distinction in *Wilson* is foreclosed, for three reasons.

First, Section 49(a) of the codifying Act of August 10, 1956, 70A Stat. at 640, states that:

> "In sections 1-48 of this Act, it is the legislative purpose to restate, without substantive change, the law replaced by those sections on the effective date of this Act."

Literally, of course, that does not cover the separability provision, Sec. 49(d), but inasmuch as Congress indicated an intention to restate the law without change, as it did

not do in its revisions of Titles 18 and 28, the conclusion must be that it considered it was making no change in the law even though in 1956 it spelled out the principle of separability in greater detail than it had in 1950.

Second, Congress has been amending Article 2(11) from time to time to reduce its coverage, without touching the clauses now in question, from which it follows that it did not regard that Article as totally invalid in every application.

Thus, in August 1956, it amended Art. 2(11) to include Guam as one of the areas in which that Article would not apply. Sec. 23 of the Act of August 1, 1956, c. 852, 70 Stat. 908, 911.

Similarly, in June 1959, it amended Art. 2(11) to exclude from its operation all of Alaska. Sec. 6(b) of the Act of June 25, 1959, P.L. 86-70, 73 Stat. 141, 142.

Inasmuch as the portion of Art. 2(11) that purported to include "that part of Alaska east of longitude 172 degrees west" was, in view of *Rassmussen* v. *United States*, 197 U.S. 516, unconstitutional on its face, and so could quite easily have been ignored, it can only be concluded from these amendments that Congress wished to preserve every portion of Art. 2(11) that it did not specifically repeal, particularly since by June 1959 the separability issue had been squarely raised.

The Government does not cite either of these recent amendments.

Third, the 1956 provision expresses the "mood" (*Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 487) of Congress, and that provision was enacted before any of the four cases arose. The petition for habeas corpus in *Guagliardo* was filed on December 2, 1957 (No. 21, R. 1),

that in the present case on August 12, 1958 (No. 22, R. 2), *Wilson* was brought on August 20, 1958 (No. 37, R. 1), and the *Grisham* case was instituted on August 11, 1958 (No. 58, R. 1). Otherwise stated, all four cases were brought after this Court's second opinion in *Reid* v. *Covert*, and after the broad separability provision of Sec. 49(d) of the Act of August 10, 1956, became applicable to the reenacted UCMJ. There is in consequence every reason now to apply the concept of separability to a specific "application" of the Code as well as to a specific "part" thereof.

C. *It follows that the constitutional question in this case must be decided.*

The starting point in any discussion of separability vs. inseparability is the principle that "a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it, and that the legislature intended the provision to stand, in case others included in the act and held bad should fall." *Dorchy* v. *Kansas*, 264 U.S. 286, 290.[1]

Here, legal effect can be given to each clause of Art. 2(11) that lists separate categories of civilians said to be subject thereto; and legal effect can likewise be given to each clause of Art. 2(11) in either its capital or non capital applications. Moreover, here the presence of an explicit separability clause shows that "the legislature intended the provision to stand." That is the very essence and purpose of such a clause. It is true that the cases dealing with separability clauses are not in all respects consistent, see Stern, *Separability and Separability Clauses*

[1] Provision held separable on remand, *State* v. *Howat*, 116 Kan. 412, 227 Pac. 752, affirmed *sub nom. Dorchy* v. *Kansas*, 272 U.S. 306.

in the Supreme Court, 51 Harv. L. Rev. 76, and that on occasion a decision that particular provisions were to be deemed separable has divided the Court on the issue of "rewriting" the statute. E.g., *United States* v. *Harriss*, 347 U.S. 612.

But in view of what has been pointed out above, pp. 16-22, it would amount to a rewriting and indeed an excision of the separability provision to hold that the several clause of Art. 2(11), UCMJ, were not separable, or that the holding as to capital offenses in *Reid* v. *Covert* was to be broadened to include all offenses through the device of a decision that the Article was inseparable.

This conclusion does not in any sense brush to one side "The wisdom of refraining from avoidable constitutional pronouncements * * *" (*United States* v. *Automobile Workers*, 352 U.S. 567, 590). Rather, it emphasizes the circumstance that a constitutional pronouncement in this case is unavoidable in view of the terms of the statute involved.

A decision rested on the narrow ground of inseparability, however much it would avoid the constitutional issue, is in our view simply not open on a fair reading of the applicable separability provisions. This Court has said that "the very highest of judicial duties is to give effect to the legislative will" (*Wilson* v. *New*, 243 U.S. 332, 359). Discharge of that duty necessarily requires consideration and decision of the basic constitutional issue now presented.

II. The Prerequisite to the Exercise of Military Jurisdiction Is That the Accused Have a Military Status, and Consequently (With a Narrow Wartime Exception Not Here Applicable), No Civilian Can Constitutionally Be Tried by Court-Martial Regardless of the Nature or Quantum of the Offense With Which He (or She) Is Charged.

A. *The holding of the Court in* Reid v. Covert *forecloses a whole collection of subsidiary contentions still advanced by the Government.*

In its Jurisdictional Statement in this case (Jur. St. 5), the Government said:

> "We are not asking the Court to reconsider its recent decision in *Covert;* what we ask is that the *Covert* ruling be not extended beyond capital offenses."

In its Brief in this case (p. 9), the Government says:

> "We do not contend that this Court should reexamine and overturn its decision in *Covert*. It is rather our position that *Covert* must be limited by the cardinal fact that the offense there involved was capital."

But those disclaimers were not reflected in the balance of the Government's Jurisdictional Statement in this case, nor do they fairly appear in the briefs on the merits filed herein and in the other related cases, particularly in the brief for the Petitioners in *Guagliardo*, No. 21, where The Pentagon's claim to exercise military jurisdiction over all accompanying civilians is stubbornly reargued at length.

If, in fact, the Government is prepared to accept the holding in *Reid* v. *Covert*, fully and ungrudgingly, then its arguments in this case must be restricted to the narrow issue of capital versus non-capital offenses; its arguments in *Grisham* to the difference between civilian dependents

and civilian employees; and those in *Guagliardo* and *Wilson* to the combination of both differences.

Contentions thus narrowed may properly be applied to the subsidiary reasoning leading up to the ultimate conclusion urged by the Government. But to the extent that the subsidiary reasons are advanced at large, as for instance the Government's renewed insistence that "Court-martial jurisdiction over civilian employees and dependents accompanying or serving with the armed forces overseas is a practical necessity" (Pet. Br., No. 21, pp. 71-82), without any indication that overseas commanders have already been denied such control in respect of dependents' capital offenses and without any assigned reason why they must have in respect of manslaughter or unpremeditated murder a power that they admittedly do not have in respect of premeditated or felony murder, the Government is, notwithstanding its disclaimer, simply engaging in still another reargument of *Reid* v. *Covert*. As we show at various points in the discussion that follows, the Government's present contentions entirely belie its basic disclaimer.

We must decline the Government's invitation to such a return engagement. Accordingly, in the interest of narrowing the issues, we commence by enumerating the propositions decided by *Reid v. Covert*, propositions which now serve as datum points for the four cases presently under consideration.

In our view, a majority of the Court in *Reid* v. *Covert*, 354 U.S. 1, agreed on the following points, which are accordingly foreclosed at this time.

1. Civilian dependents cannot constitutionally be tried by court-martial in time of peace for capital offenses.

2. The power to try civilians by court-martial must be found in some power granted by the Constitution.

3. The protections of the Bill of Rights do not automatically evaporate at the three-mile limit.

4. The "practical considerations" invoked by the Government were found insufficient to justify military trials of dependents for capital offenses.

5. The treaty power, even when phrased as "the power to conduct foreign relations," is wholly irrelevant to the present inquiry.

6. The excepting clause in the Fifth Amendment that refers to "cases arising in the land or naval forces," is not a source or grant of military jurisdiction.

Nonetheless, the Government still seeks to reargue many of the foregoing propositions, as follows:

1. It is still argued, at great length and with considerable fervor, that "Court-martial jurisdiction over civilian employees and dependents accompanying or serving with the armed forces overseas is a practical necessity" (Pet. Br., No. 21, pp. 71-82).

Except for a few pages in its brief in this case (U.S. Br. 8-15), to the effect that "The balance of interests favors court-martial jurisdiction over dependents in non-capital cases," that argument simply repeats the contentions already rejected in *Reid* v. *Covert*.

2. It is argued (Pet. Br., No. 21, pp. 83-101) that "There are no acceptable alternatives to the exercise of court-martial jurisdiction."

As we point out below, pp. 103-109, in greater detail, this argument is thoroughly misleading: It omits to state, what is the fact, that under the NATO and NATO-type agreements, foreign countries where our forces are stationed

have been conceded primary jurisdiction over dependents; it omits to state that, in fact, the Government has turned over at least one civilian dependent to the German courts for trial; and it wholly omits to mention that in *Wilson* v. *Girard*, 354 U.S. 524, the Government was at some pains to turn an American soldier over to the Japanese for trial.

It will hardly occasion surprise that the Government does not seek to explain the glaring inconsistency between its impassioned contentions in 1957 that Girard, a soldier, must be turned over to a foreign government for trial, and its equally impassioned contentions in 1959 that a similar rendition of Guagliardo, Mrs. Dial, Wilson, and Grisham, all of whom are civilians, cannot be regarded as an acceptable alternative.

3. It is argued (Pet. Br., No. 21, pp. 101-108) that "The procedures provided by court-martial are fair." We must admit ourselves unable to appreciate the relevance of that proposition in any of the present controversies over jurisdiction. It might as well be argued that the asserted fairness of court-martial procedure justifies subjection of the wives at Fort Myer, or of the children at the Naval Gun Factory, or of the civilian employees at Quantico, to the Uniform Code of Military Justice.

4. The Government attempts to justify the repetition of its already rejected arguments by saying (Pet. Br., No. 21, p. 28) that, "since the Court in *Covert* did not authoritatively (as a Court) construe Clause 14, we shall necessarily retrace many of our arguments in that case."

But this approach ignores the circumstance that the Court, as a Court, *did* authoritatively construe Clause 14, by holding that civilian dependents charged with capital offenses could not be included within the scope of that provision.

B. *The inapplicable exception here is the unquestioned power to subject to trial by court-martial civilians who in time of war are with the armed forces "in the field," that is, at a time when and at a place where military operations are carried on.*

In *Toth* v. *Quarles*, 350 U.S. 11, 15, the Court said that "the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."

In *Reid* v. *Covert*, 354 U.S. 1, 22-23, four members of the Court said, "We recognize that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform."

We submit that the only circumstances in which persons who are not actually members of the armed forces can be subjected to military law occur in that very narrow and limited situation where civilians accompany or serve with the forces in the field—which is to say, in a time and at a place where actual military operations are in progress.

That very narrow and limited exception appears in Article 2(10), UCMJ, now 10 U.S.C. §802(10), which renders subject to the Uniform Code—

> "In time of war, persons serving with or accompanying an armed force in the field." [2]

A similar provision—with the same limitation to situations "in the field"—has been in American military law since 1775. AW XXXII of 1775; Sec. XIII, Art. 23, of 1776;

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[2] As originally enacted in 1950, the word "all" preceded "persons," but this was dropped as surplusage in the 1956 revision. H.R. Rep. 970, 84th Cong., 1st sess., p. 55; Sen. Rep. 2484, 84th Cong., 2d sess., p. 66.

AW 60 of 1806; AW 63 of 1874; AW 2(d) of 1916 through 1948; all *infra*, pp. 113-114.

These provisions were uniformly interpreted by the Attorney General and by The Judge Advocate General of the Army to be limited to the actual theater of hostilities in a time of actual hostilities, i.e., the area of a shooting war against a public enemy, and thus to be inapplicable in time of war to any location not in the field, and similarly inapplicable anywhere in time of peace:

16 Op. Atty. Gen. 13;
16 Op. Atty. Gen. 48;
Dig. Op. JAG (1912), pp. 151-152, ¶¶LXIIIA-LXIIID;
Id. (1901), pp. 56-58, ¶¶161-168;
Id. (1895), pp. 75-77, ¶¶1-8;
Id. (1880), pp. 48-49, ¶¶1-8.

The Government makes a determined assault on the "in the field" limitation (Pet. Br., No. 21, pp. 57-61), dealing with it as though it were somehow a personal quirk of the late Colonel Winthrop. The Government conveniently ignores the circumstance that this distinguished military lawyer was simply reflecting—with precision and accuracy—the views of successive Judge Advocates General of the Army, as well as the views set forth in the Opinions of the Attorney General.

It is simply not possible thus to excise a limitation so vigorously insisted on in so many contexts over so many years, and to dismiss it as mere verbal surplusage whenever it appears inconvenient.

We show below, pp. 58-68, that between 1778 and 1950, no civilian dependent, and only one civilian woman, was ever tried by an American court-martial. In the brief for

Wilson, petitioner in No. 37, there are discussed in detail the scattered and inconclusive instances, many of them palpably illegal on their face, of civilians tried by court-martial other than "in the field," prior to the date of the first published opinions of The Judge Advocate General of the Army.

What seems to us significant at this juncture is the Government's approach to a whole series of consistent rulings by The Judge Advocate General of the Army. In the past, the Government has urged upon this Court the proposition that such rulings are entitled to particular weight. E.g., Pet. Br. in *Humphrey* v. *Smith*, 336 U.S. 695 (No. 457, Oct. T. 1948), p. 70. On a number of occasions, the Court has given expression to that view. *United States* v. *Cooke*, 336 U.S. 210, 216; *Hiatt* v. *Brown*, 339 U.S. 103, 109; cf. *Bowen* v. *Johnston*, 306 U.S. 19, 30.

It cannot be that the Government is unaware of the rulings now in question, which were duly cited in one of the *Covert* opinions, 354 U.S. at 34, note 61. Perhaps the Government's position as to the weight to be accorded opinions of The Judge Advocate General has now been modified, to the effect that such opinions are better ignored when following them would result in its losing a case.

It is also significant at this juncture that virtually all of the lower court opinions that have relied on the Articles of War cited *supra*, pp. 28-29, as authority for military jurisdiction over civilians in time of peace have completely ignored both the existence and the consistent interpretation of the limiting clause "in the field."[3]

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[3] See, e.g., Judge Holtzoff in *Guagliardo* in the District Court (No. 21, R. 28-31); Judge Burger, dissenting in *Guagliardo* in the Court of Appeals (No. 21, R. 47-50); Judge Arraj in *Wilson* below (No. 37, R. 63-69); *In re Yokoyama*, 170 F. Supp. 467, 470, 474-475 (S.D. Calif.); *In re Varney's Petition*, 141 F. Supp. 190, 201-203 (S.D. Calif.).

This limitation of military jurisdiction over civilians to a time of war and in an area where military operations were in progress was always enforced within rigorously contracted limits.

Thus, in the case of the many undeclared Indian wars of the last half of the XIX Century, it was held by The Judge Advocate General of the Army that court-martial jurisdiction could not be extended "to civilians employed in such connection during the period of an Indian war, but not on the theater of such war." Dig. Op. JAG, 1912, p. 151, ¶LXIIIB; *id.*, 1901, p. 57, ¶165; *id.*, 1895, p. 76, ¶5; *id.*, 1880, p. 49, ¶5. And it was likewise ruled, in 1877 and again in 1903 and 1909, that "In view of the limited theater of Indian wars, this exceptional jurisdiction is to be extended to civilians, on account of offenses committed during such wars, with even greater caution than in a general war." *Ibid.* Recent lower court opinions that rely on the supposed analogy between the Indian wars and today's cold war (see Burger, *J.*, dissenting in *Guagliardo* (No. 21, R. 45); *United States* v. *Burney*, 6 USCMA 776, 799) therefore overlook the essential basis of the cited military rulings. And, it should be added, the analogy is quite inaccurate in any event, because the Indian wars involved fighting and casualties and thus were real wars in fact (13 Op. Atty. Gen. 31; *id.* 470; *id.* 472), in which the Indians were accorded belligerent rights (*United States* v. *Plenty Horses*, U.S.D.C., D. So. Dak., Winthrop *1212) and were held to belligerent obligations (*Case of the Modoc Indians*, 14 Op. Atty. Gen. 249).

Significantly enough, this limited wartime military jurisdiction over civilians was held not to survive the end of a war, whether general or involving only Indians. "The jurisdiction, to be lawfully exercised, must be exercised during the *status belli*." Dig. Op. JAG, 1912, p. 151, ¶LXIIIB1;

id., 1901, p. 57, ¶166; *id.*, 1895, p. 76, ¶6; *id.*, 1880, p. 49, ¶6; Winthrop, *138. In this respect the jurisdiction to try civilians by court-martial resembled the jurisdiction to try a spy under the laws of war, which disappears once the war ends. *Matter of Martin*, 45 Barb. 142, 31 How. Pr. 228.

Since no contention is or could be made that the offense charged against Mrs. Dial—or, for that matter, those charged against *Guagliardo*, *Wilson*, or *Grisham*—took place "in the field" in the sense of Art. 2(10), UCMJ, or of its statutory predecessors, there is no need to delimit the geographical boundaries of "the field" in any of the pending cases. See, on that subject, the opinion of Attorney General Devens (who had been a Major General of Volunteers in the Civil War)[4] in 14 Op. Atty. Gen. 22; *In re Berue*, 54 F. Supp. 252 (S.D. Ohio); and the committee reports on Art. 2(10), UCMJ (H.R. Rep. 491, p. 11; S. Rep. 486, p. 7; both 81st Cong., 1st sess.) Nor is there any need to consider the correctness or otherwise of the World War I rulings that held the entire area of the United States to be "in the field." 2 Op. JAG (1918) 243-245; 4 Bull. JAG 223-229; *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.); *Hines* v. *Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645.

In *Kinsella* v. *Krueger*, the companion case to *Reid* v. *Covert*, where the offense for which Mrs. Smith was tried by court-martial was committed in Japan in October 1952 (R. 1-2, 7; No. 713, Oct. T. 1955), the Government invoked Art. 2(10) in its return and answer (R. 7, ¶¶3, 6), but the point was not litigated at the habeas corpus hearing, nor seriously raised thereafter.

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[4] "He had seen the elephant pretty thoroughly in his time. He commanded a division during the war and was Attorney General of the United States under President Hayes." 1 *Holmes-Pollock Letters* (Howe ed. 1941) 34. Cf. 1 *Holmes-Laski Letters* (Howe ed. 1953) 304.

A number of the decisions now relied upon by the Government to sustain the peacetime military jurisdiction in the four pending cases (Pet. Br., No. 21, pp. 61-65) were wartime cases arising "in the field," or at least in what was held to be "in the field"; e.g., *Hines* v. *Mikell*, *Ex parte Jochen*, and *In re Berue*, all *supra*; *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.); *Ex parte Falls*, 251 Fed. 415 (D.N.J.); *In re Di Bartolo*, 50 F. Supp. 929 (S.D.N.Y.); *McCune* v. *Kilpatrick*, 53 F. Supp. 80 (E.D. Va.); *Perlstein* v. *United States*, 151 F. 2d 167 (C.A. 3), certiorari granted, 327 U.S. 777, and dismissed because moot, 328 U.S. 822.

All of those cases, together with some others, arose in World Wars I and II; all involved civilian employees, none involved a civilian dependent. Consequently they are discussed in the brief of the petitioner *Wilson* in No. 37, where it is pointed out that a number of them cannot properly be sustained even under Art. 2(10) and its statutory predecessors.

It is sufficient now to repeat that the Art. 2(10) jurisdiction over civilians who in time of war, declared or otherwise, are actually in the field, i.e., where military operations are being conducted, represents the only instance when civilians can properly be tried by court-martial.

Whether this acknowledged and unquestioned jurisdiction, to which in our view the comments quoted above, p. 28, refer, is properly rested on the war power or on the Clause 14 power, seems to us quite immaterial. It is enough for present purposes that this jurisdiction, whatever its source, is plainly insufficient to reach the four cases now before the Court.

We agree with the Government (Pet. Br., No. 21, p. 57) that "the Congressional power under Clause 14 is 'peace power' as much as 'war power.'" But the peace power of Clause 14 extends only to those who have a military status.

C. *Military jurisdiction depends on military status and not on the nature of the offense charged.*

The Government's position in the present case, succinctly stated, is that it does not question the holding of *Reid* v. *Covert* that civilian dependents cannot be tried by court-martial for capital offenses, but that they can be so tried for non-capital offenses.

That argument, we submit, is unsound in law, in logic, and in history. In our view, the prerequisite to the exercise of military jurisdiction—once past the narrow exception just discussed under the preceding subheading—is a military status on the part of the person accused, and such jurisdiction does not in any sense depend on the nature or quantum of the offense with which that person is charged.

Colonel Winthrop declared, after a lifetime spent in the study and practice of military law, that (p. 146; italics in original),

> "*a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*"

Winthrop also declared (p. 145) that the Constitution

> "in a further provision also,—the Vth Amendment,—clearly distinguishes the military from the civil class as separate communities. It recognizes no third class which is part civil and part military—military for a particular purpose or in a particular situation, and civil for all other purposes and in all other situations—and it cannot be perceived how Congress can create such a class, without a disregard of the letter and spirit of the organic law."

We shall now proceed to a documentation of these conclusions.

1. *Military jurisdiction depends upon military status.*

We start with the proposition, succinctly expressed in a recent opinion, that "The military constitutes a specialized community governed by a separate discipline from that of the civilian." *Orloff* v. *Willoughby*, 345 U.S. 83, 94.

The military is a separate community because, when individuals become members of the armed forces, they assume new relationships and new obligations, which are so comprehensive in their totality as to constitute a status. See, e.g., *In re Grimley*, 137 U.S. 147; *White* v. *United States*, 270 U.S. 175; *United States* v. *Williams*, 302 U.S. 46; *United States* v. *Standard Oil Co.*, 332 U.S. 301. But the Government's arguments completely overlook the circumstance that assumption of this status necessarily involves the individual's subjection to courts-martial, which "form a system of courts separate from civil courts and created by virtue of an independent grant of power in the Constitution." Brandeis, *J.*, in *Crowell* v. *Benson*, 285 U.S. 22, 90, note 26. And see *Dynes* v. *Hoover*, 20 How. 65, 79, where it was early pointed out that the Clause 14 power "is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other."

When an individual is commissioned, he assumes military status upon acceptance of a regular commission and upon call to duty under a non regular commission. For those voluntarily serving in the ranks the moment of transition is the signing of the contract of enlistment (*In re Grimley*, 137 U.S. 147), for those conscripted since 1940 it is the induction ceremony (*Billings* v. *Truesdell*, 321 U.S. 542).

Under the Selective Draft Act of 1917 it was the time the draftee was ordered to report for duty (e.g., *Franks* v. *Murray*,

This circumstance is emphasized in the Court's discussion in *In re Grimley*, 137 U.S. 147, 151, 152:

> "But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract; but it is one of those contracts which changes the status; and where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes" (p. 151).
>
> "By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged" (p. 152).

The effect of the change in status was further emphasized in *Gibson* v. *United States*, 329 U.S. 338, which involved a conscientious objector who had reported at a camp for work of national importance, and had then, after five days' stay there, departed without leave. The Government accordingly argued (329 U.S. at 352), by analogy to the *Grimley* case, "that when Gibson went to the camp and there went through the preliminary formalities for becoming a member, he became 'inducted' as a camp member, just as one becomes a member of the armed forces by undergoing the induction ceremony, * * *. Thereafter * * * Gibson became subject to the camp's 'jurisdiction,' just as the wrongfully inducted soldier would become subject to military jurisdiction; and, like the latter, cannot raise the illegality of his induction as a defense to a charge of violating any duty imposed upon inducted members * * *."

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248 Fed. 865 (C.A. 8); cf. *Patterson* v. *Lamb*, 329 U.S. 539), and the same was true in the case of the militiamen called into federal service in earlier conflicts (*Houston* v. *Moore*, 5 Wheat. 1; *Martin* v. *Mott*, 12 Wheat. 19).

This Court rejected the argument; it said (329 U.S. at 357):

> "In the first place, there are obvious and important differences between the two situations which it is sought to connect by the claimed resemblance. Not the least is that in the one instance the person concerned crosses the vast gulf between civil and military jurisdiction, with all the attendant consequences for change in status and rights, whereas in the other no such chasm is traversed. The alleged transfer of 'jurisdiction' is only from one civilian agency to another, both branches of the Selective Service System, and there is none at all from the authority of the civilian courts as agencies for the enforcement of obligations imposed by the law. There is in fact no change in 'jurisdiction' whatsoever, except in the sense that from the time he becomes a camp member the registrant's duties are different and his orders come through different channels of the same agency.
>
> "Unlike the man 'actually inducted,' the person classified IV-E remains a civilian; his duties are not military in character; he is not subject to military discipline or authority; and for violation of duties or orders he cannot be tried by court martial or military tribunal. On the contrary, the Selective Service Act expressly provides the same civil penalties and mode of trial for violating duties arising when he enters the camp as for those arising before that time."

Accordingly, it follows that a civilian who becomes a soldier's dependent, whether by marriage in the case of a wife, or by living with the soldier as in the case of a mother-in-law, or by birth in the case of a child, does not by

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[1] See the assumptions in the discussion at pp. 876-877 of the House Hearings on the UCMJ as to the comparative amenability to

assuming the relation of dependency become one who "crosses the vast gulf between civil and military jurisdiction, with all the attendant consequences for change in status and rights."

That status can only be assumed, in the case of officers, by accepting a commission, or, in the case of enlisted persons, by taking a specific oath (10 U.S.C. §501):

> "I, ..., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice."

See also the oath for National Guardsmen prescribed by 32 U.S.C. §304.

Very plainly, no such crossing from civil to military jurisdiction takes place when the dependent lives on a military reservation in the United States, and we think that *Reid* v. *Covert* disposes of the contention that the situation is any different where the American military jurisdiction is sought to be exercised over a civilian dependent beyond the three-mile limit. And, as we shall proceed to demonstrate in more detail below, the military jurisdiction here in question cannot be sustained by being separated into jurisdiction to punish for non-capital crimes now that it has been finally decided that no such jurisdiction exists in respect of capital crimes.

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military law of a mother-in-law temporarily visiting an officer abroad as compared with one living with him there permanently.

2. *A differentiation between capital and non-capital offenses is appropriate only in a due process setting, involving the exercise of an admitted power, but entirely inappropriate here, where the question is whether a particular power exists at all.*

The basic fallacy that inheres in the Government's effort to differentiate between capital and non-capital offenses in this case (Br. 8-15) is the treatment in terms of due process of what is a question of jurisdiction, the treatment in the setting of appropriate exercise of power of what is a question of the existence of power.

Otherwise stated, the Government is endeavoring to expand the scope of Clause 14—and correspondingly to contract the protection of the Sixth Amendment—in terms and concepts that are appropriate only to the construction of the Due Process Clauses of the Fifth and Fourteenth Amendments.

In short, the Government is here resurrecting the fallacy underlying the premise of the first opinions in *Kinsella* v. *Krueger*, 351 U.S. 470, and *Reid* v. *Covert*, 351 U.S. 487, "that under the Constitution the mere absence of a prohibition against an asserted power, plus the abstract reasonableness of its use, is enough to establish the existence of the power." 354 U.S. at 66.

It was the recognition of this fallacy that led to the rehearing in *Krueger* and *Covert* and to the withdrawal, following the rehearing, of the earlier opinions. Yet the Government is now urging reaffirmation of the earlier view, which since 1957 is frankly conceded to have been erroneous.

A brief review of a number of basic and unquestioned precedents will serve to assist in exposing the fundamental misapprehensions of the Government's arguments on the capital versus non-capital distinction.

In *Wilson* v. *New*, 243 U.S. 332, where this Court sustained the validity of an eight-hour law for railway employees that Congress had passed to avert a nationwide rail strike, a matter in that pre-truck and pre-airplane age of far more concern than it might be today, it was said (243 U.S. at 348) that

> "although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exercise of a living power already enjoyed."

That thought was clarified and expanded in the case that sustained the Minnesota Mortgage Moratorium law against a contention that it violated the Contract Clause, *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398. There Chief Justice Hughes, speaking for the Court, said (290 U.S. at 425, 426):

> "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved." * * *
>
> "While emergency does not create power, emergency may furnish the occasion for the exercise of power." * * *
>
> "When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the States to 'coin money' or to 'make anything but gold and silver coin a tender in payment of debts.' But where constitutional grants and

limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause."

We are dealing here with a somewhat intermediate situation, the content of "land and naval Forces" in Clause 14, in the light of the now unquestioned holding of *Reid* v. *Covert*, that this Clause does not include civilian dependents charged with the commission of capital offenses. Passing for the moment any possible contention that civilian dependents stand on a footing different from that of civilian employees, a matter dealt with in the petitioner *Wilson's* brief in No. 37, the proposition now in question is the argument advanced in the present case by the Government, which is that while the power "To make Rules for the Government and Regulation of the land and naval Forces" does not extend to capital offenses committed by defendants, it does embrace their non-capital offenses.

We confess to an inability to find that distinction either in the words of the Constitution, or in "their origin and the line of their growth." *Gompers* v. *United States*, 233 U.S. 604, 610.

The distinction between capital and non-capital offenses is one appropriate to considerations of Due Process, where the exercise of an admitted power is in question. That issue arises, in varying contexts and with varying results, in criminal cases where a capital penalty has been adjudged. See the following representative examples out of many: *Powell* v. *Alabama*, 287 U.S. 45; *Brown* v. *Mississippi*, 297 U.S. 278; *Chambers* v. *Florida*, 309 U.S. 227; *Lisenba* v. *California*, 314 U.S. 219; *Francis* v. *Resweber*, 329 U.S. 459; *Smith* v. *Baldi*, 344 U.S. 561; *Stein* v. *New York*, 346 U.S. 156; *Reece* v. *Georgia*, 350 U.S. 85; *Darcy* v. *Handy*, 351 U.S. 454; *Chessman* v. *Teets*, 354 U.S. 156.

Specifically, a denial of counsel that will vitiate a conviction in a capital case (*Powell* v. *Alabama*, 287 U.S. 45) may or may not result in reversal in one non-capital (compare *Betts* v. *Brady*, 316 U.S. 455, with *Gibbs* v. *Burke*, 337 U.S. 773). In all those instances, the courts whose judgments were being reviewed had undoubted jurisdiction to try the several defendants, and the question was whether the exercise of that jurisdiction satisfied the standards of the Due Process Clause. Here, however, the very existence of the power of courts-martial to try civilian dependents for any offense is in issue, and that power cannot vary from offense to offense. If the courts-martial have jurisdiction at all, they have jurisdiction to try for all offenses in the Uniform Code that by their terms include civilians. But since courts-martial lack jurisdiction to try dependents for capital offenses, essentially because such dependents cannot fairly be included in Clause 14, we think it necessarily follows that non-capital offenses committed by dependents are similarly excluded from the reach of the military jurisdiction.

That conclusion is not one newly generated on behalf of Mrs. Dial. It has had the support of seven members of the Court—of three Justices on consideration of the petition for rehearing in *Covert* and *Krueger*, see 352 U.S. at 902, and of four more after the rehearing. It likewise had the support of the Government at that time, see pp. 16-20, 82-95, Supplemental Brief for Appellant and Petitioner on Rehearing, Nos. 701 and 713, Oct. T. 1955. And, as will be pointed out below, pp. 55-57, the Government in a number of later cases likewise acquiesced.

None the less, we deem it appropriate to set forth additional supporting reasons why the Government's present arguments in support of the distinction are not well founded.

D. *The purported distinction between capital and non-capital offenses as a criterion of military jurisdiction over civilian dependents is untenable on numerous grounds.*

1. *The purported jurisdictional distinction cannot be found in the Constitution.*

The only reference to capital crimes in the Constitution is in the first portion of the Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces * * * ."

This provision on its face undercuts in two respects the Government's purported distinction between capital and non-capital offenses:

First, the Constitutional differentiation by its terms has no application to any trial by court-martial.

Second, the Constitutional differentiation is not between capital and non-capital offenses, but between capital or otherwise infamous crimes and all others.

Any offense for which imprisonment at hard labor may be adjudged is, in a constitutional sense, an infamous crime. *United States* v. *Moreland*, 258 U.S. 433; *Wong Wing* v. *United States*, 163 U.S. 228; *Re Claasen*, 140 U.S. 200; cf. *Duke* v. *United States*, 301 U.S. 492. Even if one does not agree with all that is said in the *Moreland* case, see Oppenheimer, *Infamous Crimes and the Moreland Case*, 36 Harv. L. Rev. 299, it is still perfectly plain that the crime charged against Mrs. Dial was an infamous one by constitutional standards:

She was originally charged with unpremeditated murder in violation of Art. 118(2), UCMJ (R. 51-52). Without

waiving her jurisdictional rights, she offered to plead guilty to involuntary manslaughter in violation of Art. 119, UCMJ (R. 53); her offer was accepted (R. 52); and the charges were redrafted accordingly (R. 36-37). She pleaded guilty (R. 39), and was sentenced to be confined at hard labor for three years (R. 45), the maximum penalty for the offense (MCM, 1951, p. 223). This sentence was approved by the convening authority, who designated the Federal Reformatory for Women at Alderson, W. Va., as the place of confinement (R. 11).

Plainly then, Mrs. Dial was held to answer for an infamous crime.

We note in passing in the margin that the other two instances of non-capital offenses tried by court-martial that are now before this Court were similarly infamous in a constitutional sense.[7]

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[7] *Guagliardo*, No. 21: Charge I (R. 15), stealing in violation of Art. 121, UCMJ; value of goods allegedly stolen, over $4000; maximum permissible sentence, 5 years confinement at hard labor (MCM, 1951, p. 223). Charge II (R. 15), conspiracy to steal goods worth over $4000 in violation of Art. 81, UCMJ; maximum permissible sentence, 5 years confinement at hard labor (MCM, 1951, p. 219, note 4). Found guilty and sentenced to 3 years confinement at hard labor; finding of guilty of Charge I disapproved, but sentence approved (R. 2, 5-6, 8-9). Confined at Branch United States Disciplinary Barracks, New Cumberland, Pa. (R. 19).

Wilson, No. 37: Charge I (R. 19), 2 specs., lewd and lascivious acts with minors, in violation of Art. 134, UCMJ; maximum penalty for each act, 7 years confinement at hard labor (MCM, 1951, p. 226; see R. 38). Charge II (R. 19-20), 3 specs., sodomy, in violation of Art. 125, UCMJ; maximum penalty for each act, 5 years confinement at hard labor (MCM, 1951, p. 223; see R. 38). Additional Charge (R. 21-22), 2 specs., exhibiting obscene pictures in violation of Art. 134, UCMJ; maximum penalty for each act, 4 months confinement at hard labor (MCM, 1951, p. 225; see R. 38). Total permissible punishment for all offenses charged, 29 years and 8 months confinement at hard labor (R. 38). Sentence, confinement at hard labor for 10 years (R. 39) cut to 5 years by the convening authority, and Branch United States Disciplinary

Another approach, based on the language of Clause 14, leads to the same result.

The Government urges that "the land and naval Forces" includes all civilians enumerated in Art. 2(11), UCMJ, at any time, at any place, and—on the basis of some of the precedents it adduces—anywhere.

We say, and we have vouched to warranty the Attorney General and The Judge Advocate General of the Army, that the only civilians who can properly be comprehended within that phrase are those who are with the land and naval forces at a time and in a place where military operations are in progress.

In *Reid* v. *Covert*, this Court rejected the Government's contentions, and adopted those we are now advancing, in a case that involved civilian dependents charged with capital offenses.

So far, so good; but, taking that as a datum point, we submit that it is impossible, even with the most refined constitutional exegesis, to conclude that the correct interpretation of "land and naval Forces" plainly excludes dependents charged with premeditated murder but somehow, with equal clarity, includes dependents charged with unpremeditated murder or with manslaughter.

We submit that no such distinction can possibly be found in the terms of Clause 14.

The foregoing conclusion, drawn from the language of two provisions of the Constitution, that the Government's capital-non-capital distinction is utterly untenable, is forti-

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Barracks, New Cumberland, Pa., designated as place of confinement (R. 8). This was later changed to a U. S. penitentiary or reformatory (R. 10-11). Wilson is presently a patient at Fitzsimons Army Hospital (R. 1, 11).

fied when that distinction is examined from other points of view.

2. *The purported jurisdictional distinction is untenable as a matter of history.*[8]

When the Constitutional Convention met, and at all times during the ratifying process, there was no Navy (Knox, *A History of the United States Navy* (1948 ed.) 44), and the minuscule American Army was governed by the Articles of War of 1776 as amended by those of 1786 (Winthrop *1489-*1508).

These were 107 in number, of which only 59 were punitive in any degree; some made provision only for petty fines. No less than seventeen articles enumerated capital offenses, for which the death penalty could be imposed, including desertion, which was capital at all times (Sec. VI, Arts. 1 and 3 of 1776). See analysis in Appendix C, below, pp. 116-118.

Plainly, then, capital offenses were of the essence of the law military when the Constitution was drafted and ratified.

And, despite the observation of Secretary of War Knox, made in August 1789 (1 Am. St. Pap. Mil. Aff. 6), "that the change in the Government of the United States will require that the articles of war be revised and adapted to the constitution," no comprehensive set of Articles of War under the Constitution was enacted until 1806, and then only after considerable legislative delay. See, for a summary of the legislative history, 72 Harv. L. Rev. at 15-22.

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[8] The discussion that follows considers only whether, as a matter of historical evidence, there is any basis for a division of military jurisdiction between capital and non-capital offenses.

Other discussions of historical materials appear below in other connections (pp. 57-81, 87-95), and in the brief filed on behalf of the petitioner *Wilson* in No. 37.

In the interim, the death penalty had frequently been exacted under successive commanders, principally in respect of desertion,[9] and when the 1806 revision was under consideration, one Member of Congress complained bitterly that "almost every article in the bill was stained with blood" (15 Annals of Cong. 326). But his objections did not prevail (*id.*, 327, 338).

The 1806 Articles of War were 101 in number, plus a section denouncing spying. Fifty-six out of those 102 provisions were punitive, and of those 16, including again desertion at all times (AW 20 and AW 22 of 1806), were capital. See Appendix C, *infra*, pp. 118-121. Not until 1830 did Congress reduce desertion in peacetime to the status of a non-capital offense. Act of May 29, 1830, c. 183, 4 Stat. 418.

But while these early American military codes were thus severe, and while, as has been seen, they subjected to their provisions civilians with the army "in the field" (Sec. XIII, Art. 23, of 1776; AW 60 of 1806), each contained only a very few provisions that distinguished between capital and non-capital offenses:

(i) A regimental or garrison court-martial—unlike a general court-martial—could not try capital cases. AW 4 of 1786; AW 67 of 1806.

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[9] Under St. Clair: 2 W. H. Smith, *The St. Clair Papers* (1882) 249, 255; *Winthrop Sargent Diary of the St. Clair Campaign*, 33 Ohio Arch. & Hist. Soc. Proc. (1924) 247-248.

Under Wayne: *Wayne Orderly Book*, 34 Mich. Pioneer & Hist. Coll. 341, and MS., Hist. Soc. Pa., *passim;* see letter Wayne to Sec. Knox, Sept. 7, 1792, in 1 *Campaign into the Wilderness: The Wayne-Knox-Pickering-McHenry Correspondence* (Knopf ed. 1955) 81.

Under Wilkinson: *Wilkinson Order Book* (MS., Nat. Archives) 679, 715-718 (execution for repeated desertion confirmed by Pres. Jefferson).

(ii) Only those offenses could be capitally punished that had been specifically made capital by Congress. Sec. XVIII, Art. 3, of 1776; AW 24 of 1786; AW 87 of 1806.

(iii) Depositions could not be used in capital cases. Res. of Nov. 16, 1779, 15 J. Cont. Cong. 1277, 1278; AW 10 of 1786; AW 74 of 1806.

(iv) Records of courts of inquiry could only be used "in cases not capital or extending to the dismission of an officer." AW 26 of 1786; AW 92 of 1806.

Finally, neither of the first two American military codes in effect under the Constitution specifically denounced common law felonies as such, but contemplated rather that such crimes would be dealt with by the civil authorities, to which end each provided that offenders against the civil law would, under punitive sanctions to compel obedience, be handed over to the civil magistrate. Sec. X, Art. 1, of 1776; AW 33 of 1806. Indeed, it was long held that neither the military nor the naval articles established a general criminal jurisdiction in respect of offenses committed by soldiers and sailors against civilians in circumstances not affecting service discipline. Dig. Op. JAG, 1895, pp. 67-69, ¶¶2, 3; 16 Op. Atty. Gen. 578; G.O. 22 of 1833 (ruling by Maj. Gen. Macomb, then Commanding the Army).[10]

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[10] G.O. 22 of 1833, Sec. II:

"The General in Chief upon a full consideration of this case regrets that he cannot approve of the finding and sentence: Not because the offence committed [stealing from a valise at a public wharf; stealing from a barn or stable] should not be punished in the most exemplary manner, but because the charge as specified, is for a crime, cognizable before a civil tribunal, and not before a Court Martial. Had the specification of the charge been framed in such a manner as to have made it a military offence, of which it is no doubt susceptible, the General would have found it his duty to have confirmed the sentence. * * * All that was requisite in this case to have rendered the offence cognizable by a Military Court, was to have charged private Townsend, with conduct highly

Not until 1863 were common law felonies as such made punishable by court-martial, and then only in time of war. Sec. 30 of the Act of March 3, 1863, c. 75, 12 Stat. 731, 736; AW 58 of 1874. Thereafter, non-capital offenses were dealt with under the general article as "crimes not capital." *Ex parte Mason*, 105 U.S. 696; *Grafton* v. *United States*, 206 U.S. 333. Such offenses only became punishable *eo nomine* after the effective date of AW 93 of 1916, and the capital common law felonies, murder and rape, could not be tried by court-martial when committed in the United States in peacetime until the advent of the Uniform Code. Cf. *Lee* v. *Madigan*, 358 U.S. 228.

The short of the matter, therefore, is that the distinction between capital and non-capital offenses that the Government now puts forward as the touchstone of military jurisdiction over civilian dependents is wholly foreign to anything in the origin of Clause 14 and is equally foreign to anything in the lines of its growth that is delineated in successive enactments of the military code over the years.

3. *The purported jurisdictional distinction is untenable in the light of earlier tests of military jurisdiction.*

There was no opinion of the Court in *Burns* v. *Wilson*, 346 U.S. 137, which accordingly does not stand as a precedent. *Hertz* v. *Woodman*, 218 U.S. 205, 212-214; *United States* v. *Pink*, 315 U.S. 203, 216. Consequently, the extent to which the doctrine of *Johnson* v. *Zerbst*, 304 U.S. 458, may properly be applied on collateral review of a con-

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disorderly and unsoldierlike in being absent from his Quarters on or about the last day of August, 1832, and at that time stealing from a valise at the public wharf at West Point, New York, one black cloth * * * &c., to the prejudice of Military discipline; in which case the circumstances of the theft can only be received as the evidence of the disorderly and unsoldierlike conduct; and then the Prisoner if found guilty would have been subject to the punishment authorized by the 99th article and rules of war [of 1806]."

viction by court-martial still remains an open question. See 346 U.S. at 844-851; 72 Harv. L. Rev. at 296-304.

But the pre-*Johnson* v. *Zerbst* test of the jurisdictional validity of a conviction by court-martial has always been clear; it was several times stated by this Court (*Carter* v. *Roberts*, 177 U.S. 496, 498; *Carter* v. *McClaughry*, 183 U.S. 365, 380-381; *Grafton* v. *United States*, 206 U.S. 333, 347-348):

> "Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced."

That formulation of the rule explains why the Government's present argument is untenable, *viz.*, because that argument makes military jurisdiction over the person depend on the nature of the subject matter, and because it applies to jurisdiction over civilian dependents a test of subject matter wholly different from that applicable to jurisdiction over persons actually in the service.

Some crimes are wholly outside the jurisdiction of a court-martial; treason is perhaps the clearest example. Winthrop *973; cf. *United States* v. *Provoo*, 215 F. 2d 531 (C.A. 2); *Petition of Provoo*, 17 F.R.D. 183 (D. Md.), affirmed, 350 U.S. 857. Thus, if a soldier duly enlisted were sought to be prosecuted before a court-martial for treason committed within his current enlistment, the court would plainly have jurisdiction over his person, although, equally plainly, it would lack jurisdiction over the subject matter.

In view of Arts. 118 and 119, UCMJ, a court-martial unquestionably has jurisdiction over the subject matter of homicide. Yet on the view urged by the Government, court-martial jurisdiction over a civilian dependent would exist in respect of Art. 118(2), Art. 118(3), and Art. 119, but would be wholly absent in respect of Art. 118(1) and Art. 118(4)—because the first three are non-capital and the latter two capital. See text of Art. 118, *infra* p. 115.

It must therefore be obvious, without further elaboration, that the Government's distinction is shown, in the light of the traditional test of military jurisdiction, to be quite illusory.

4. *The purported jurisdictional distinction is untenable in the context of the Uniform Code of Military Justice.*

The present *Manual for Courts-Martial* defines capital offense as follows in ¶15*a*:

> "(2) An offense is capital within the meaning of Article 19 when the maximum punishment which a general court-martial may adjudge therefor includes the death penalty. Subject to the exceptions noted in the following subparagraph, the offenses denounced in Articles 94 [Mutiny or sedition], 99 [Misbehavior before the enemy], 100 [Subordinate compelling surrender], 102 [Forcing a safeguard], 104 [Aiding the enemy], 110*a* [Willful hazarding of vessel], 118(1) and (4) [Premeditated and felony murder], and 120*a* [Rape] are capital at all times; those denounced by Articles 85 [Desertion], 90 [Assaulting or willfully disobeying officer], 101 [Improper use of countersign], 106 [Spies], and 113 [Misbehavior of sentinel] are capital if committed in time of war.
>
> "(3) Although capital under one of the articles cited, an offense is not capital if the applicable maximum

limit of punishment prescribed by the President under Article 56 is less than death * * *[11] or, in any case in which the death penalty is not mandatory but is authorized by law whenever the authority competent to convene a court-martial for a capital case has directed that the case be treated as non-capital pursuant to Article 49.[12] Upon a rehearing or a new trial a case is not capital if the authorized sentence adjudged at a prior hearing or trial was other than death (Art. 63). * * *"

Let us apply the foregoing criteria to the Government's present contentions in a number of recent situations where civilian dependents were tried by court-martial.

(a) A civilian dependent is charged with premeditated murder under Art. 118(1), a capital offense, but in order to enable the prosecution to use depositions, the convening authority under Art. 49(f), *infra* note 12, directs that the case be treated as non-capital. A recent case involved this precise situation. CM 376967, *Eunice M. Brillhart*, review denied, 6 USCMA 808.

(b) A civilian dependent is charged with premeditated murder under Art. 118(1), a capital offense, and the case is similarly treated as non-capital to permit the use of depositions by the prosecution. Thereafter, pursuant to an agreement with the convening authority, the charges are

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[11] Thus, see MCM, p. 223, wilfully hazarding a vessel in violation of Art. 110*a* has been made non-capital under the Table of Maximum Punishments.

[12] Art. 49(f) provides in pertinent part that "a deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the convening authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial."

amended to allege manslaughter in violation of Art. 119, and the accused pleads guilty to the reduced charge. CM 396739, *Cynthia P. Tyler.*

Are those two cases to be regarded as capital or as non-capital for purposes of the jurisdictional distinction now urged by the Government? In *Brillhart,* the question was never formally decided, but is a fact that, soon after the decision in *Reid* v. *Covert,* 354 U.S. 1, the unexecuted portion of the sentence was remitted, and Mrs. Brillhart was released.

In *Tyler,* two members of the Army Board of Review held that there was no military jurisdiction over dependents for non-capital offenses, while a third member held simply that there was no jurisdiction in the particular case saying (p. 7, Board of Review opinion): "Having no jurisdiction over the offense in the first place, the convening authority had no power to direct that the case be tried as non-capital and could not by such a simple expedient give to himself the jurisdiction which the Supreme Court has held could not be granted to him by Congress."

(c) A civilian dependent is charged with and convicted of premeditated murder, a capital offense, and is sentenced to life imprisonment. After the conviction is reversed, rehearing is directed; in view of Art. 63(b), UCMJ and MCM ¶15*a*(3), *supra,* p. 52), the case now is non-capital. Before the rehearing is had, the accused seeks release on habeas corpus. That was precisely the situation in *Reid* v. *Covert,* 354 U.S. 1; see No. 701, Oct. T. 1955 (R. 2, ¶¶ 11; R. 8, ¶¶VIII, IX; R. 12, 95-96, 97. Yet this Court held that the case was capital, and that there was no jurisdiction to try Mrs. Covert by court-martial.

(d) On occasion, a civilian dependent may be charged with unpremeditated murder in violation of Art. 118(2)

and, on her offer to plead guilty, the charge will be reduced to one of manslaughter in violation of Art. 119. That is the present case; see R. 51-56, R. 10-12. Compare *Tyler, supra*, pp. 52-53.

Curiously enough, the Government's Statement in its brief herein (U.S. Br. 3-4) nowhere mentions that Mrs. Dial was originally charged with the more serious offense.

(e) It must also be borne in mind that while the Code's distinction between premeditated murder in Art. 118(1) and unpremeditated murder in Art. 118(2) is that between one who "has a premeditated design to kill" and one who "intends to kill or inflict great bodily harm," the Court of Military Appeals, disregarding the binding (see Art. 36(a), UCMJ) effect of federal decisions to the contrary (*Bullock* v. *United States*, 122 F. 2d 213 (App. D.C.); *Jones* v. *United States*, 175 F. 2d 544 (C.A. 9)), has completely blurred the distinction by espousing the concept of "instantaneous premeditation." *Sechler*, 3 USCMA 363; cf. *McMahan*, 6 USCMA 709, 716.

In other words, the capital/non-capital distinction is not only essentially unworkable in the area of homicide; but it would place into the hands of a military officer, the convening authority, an unreviewable discretion to exercise jurisdiction over civilians simply by down-grading the offenses for which he will try them. No dependent placed on trial before a court-martial on a charge of unpremeditated murder has yet been sentenced to death. Therefore, by charging the offense as unpremeditated murder under Art. 118(2) or as manslaughter under Art. 119, approval of the distinction now urged by the Government would, as a practical matter, extend military jurisdiction over every civilian dependent charged with homicide. And, since but few of the other capital offenses enumerated in the

Code (MCM ¶15*a*(2), quoted *supra*, pp. 51-52) can or will ever be committed by dependents, approval of the distinction would, in substance and effect, amount to a nullification of *Reid* v. *Covert*.

5. *The Government in several cases decided subsequent to* Reid v. Covert *has acted on the assumption that the purported jurisdictional distinction is untenable.*

In several instances that we have found, all of them subsequent to *Reid* v. *Covert*, the Government acquiesced in rulings holding that there was no military jurisdiction to try civilian dependents for non-capital offenses.

(a) In *Louise Smith* v. *Kinsella*, S.D.W.Va., H.C. No. 1963, the court below freed on habeas corpus a civilian dependent who had been tried by a court-martial for a non-capital offense; see the references in the opinion below in the present case at R. 63, 64, 67. The judgment was entered on August 12, 1957; the Government did not appeal.

(b) In CM 396739, *Cynthia P. Tyler*, *supra*, pp. 52-53, an Army Board of Review held that where a civilian dependent, charged with a capital offense, had her case treated as non-capital by direction of the convening authority, pursuant to Art. 49(f), UCMJ, *supra*, note 12, p. 52, in order to permit the use of depositions by the prosecution, the case was capital for jurisdictional purposes, so that the conviction could not be sustained. The Judge Advocate General of the Army did not seek review of that ruling by certifying the case to the Court of Military Appeals under Art. 67(b)(2), UCMJ, as he might have done.

(c) In *Emma Cheaves* v. *Wilber M. Brucker, Secretary of the Army*, D.D.C., H.C. No. 100-58, the petitioner, a civilian dependent in Germany, sought release from mili-

tary custody where she was being held under a charge of unpremeditated murder in violation of Art. 118(2), a non-capital offense. The Government opposed only her return to the United States, a step which would have precluded her trial by any court. On September 29, 1958, Judge Letts granted the petition "to the extent of ordering the release from military custody of petitioner in Frankfurt am Main, in the Federal Republic of Germany." The Secretary of the Army, respondent in the proceeding, did not appeal, and Mrs. Cheaves was thereafter tried by a German court. Washington *Evening Star,* May 26, 1959, p. B-11.

(d) A fourth case, *Madelyn E. Hitt* v. *Neil H. McElroy, Secretary of Defense,* D.D.C., H.C. No. 29-58, was slightly different. There Mrs. Hitt was charged by the Air Force under Art. 118, UCMJ, with the premeditated murder of her infant son on Okinawa. She was not a civilian dependent, but was the wife of a civilian employee of the Philco Corporation, who was assigned to the Kadena Air Base. Mrs. Hitt's petition was filed on April 7, 1958. Thereafter, on April 11, the U.S. Commissioner for the District of Columbia, issued a fugitive warrant, charging a violation of 18 U.S.C. §1111 within the special jurisdiction set out in 18 U.S.C. §7; the charge under Art. 118, UCMJ, was withdrawn; and Mrs. Hitt was confined pursuant to a commitment order issued by the Judge of the U.S. Civil Administration of the Ryukyu Islands. Accordingly, after finding that the petitioner was not in custody pursuant to any charges arising out of the Uniform Code, Judge Curran on April 21, 1958, dismissed the application for the writ, and discharged the rule to show cause.

Whether the disposition of the first three cases noted above amounts to acquiescence by the Government in important rulings in the administration of the criminal law sufficient to shape interpretation (cf. *Andres* v. *United*

States, 333 U.S. 740, 756) need not be determined. But that disposition plainly shows that the capital/non-capital distinction that the Government now so vigorously espouses is an afterthought. And, as the foregoing discussion has amply demonstrated, it is an afterthought with the usual infirmities attaching to such delayed action cerebrations.

E. *Historical materials emphasize the lack of foundation for military jurisdiction over civilian dependents in time of peace.*

Here, as on the *Covert-Krueger* rehearing, the Government adduces a mass of so-called historical materials. Here, as there, those materials omit a good deal and in many instances are badly misread. Far from reflecting "a solid basis" (Pet. Br., No. 21, p. 28) or a "well-established practice" (U.S. Br., this case, p. 15) for the exercise of military jurisdiction over civilian dependents in time of peace or indeed anywhere but "in the field" in a time and at a place where military operations are being carried on, the totality of the available historical evidence, once it is examined in the light of accepted historical techniques, establishes precisely the contrary of what the Government seeks to show in the course of its present efforts, efforts which even sympathetic commentators have characterized —we hope with reason—as "a losing rear-guard action." 71 Harv. L. Rev. at 713.

Under the present heading, we restrict ourselves largely to the evidence dealing with trials by court-martial of civilian dependents, together with some general observations as to the proper approach. The bulk of the evidence dealing with military trials of civilians concerns employees, and so is treated in the petitioner *Wilson's* brief in No. 37. English materials are dealt with there, and, in part below at pp. 68-81.

1. *No civilian dependents were ever tried by any American court-martial under the Constitution prior to 1950.*

The Government does not cite, and counsel for Mrs. Dial have not found, any instance of a civilian dependent tried by an American court-martial under the Constitution prior to 1950. The Government does not cite any instances of any civilian women tried or punished by an American court-martial under the Constitution prior to 1950; we have found two, of a nature that hardly supports the Government's views.

(a) We refrain, advisedly, from exploring Colonial practices; they are not safe guides. Certainly the trials by court-martial directed by Governor Berkeley after his suppression of the Bacon Rebellion (see Washburn, *The Governor and the Rebel* (1957) 89-91) do not provide "a solid basis" for similar excesses today.

This Court has held that Colonial price-fixing laws do not measure the scope of modern police power. See *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U.S. 522, 537. (Nothing said in *Nebbia* v. *New York,* 291 U.S. 502, it should be noted, turned on Colonial precedents.)

And the provision in Art. 13 of the Virginia Bill of Rights (9 Hening, Stat. 109, 111), which states "that standing armies, in time of peace, should be avoided, as dangerous to liberty," assuredly does not measure constitutional power today; indeed, the circumstance that the Constitution did provide for just precisely what the earlier document had denounced was one of the reasons why the latter's author, George Mason, refused to sign the Constitution. 2 Farrand, 640.

(b) The Government lists two trials by brigade court-martial of soldiers' wives, at Valley Forge in 1778 (Br. 25),

proceedings that, as the *Writings of Washington* show, were not submitted to the Commander in Chief. Those women, plainly, were with the army in the field, in time of war; their cases were therefore within the single area of unquestioned military jurisdiction over civilians (*supra*, pp. 28-33); and their cases accordingly do not support the vastly greater jurisdiction now contended for by the Government.

All the rest of the Government's history (Br. 16-26) simply documents what was indeed well known, that in the Eighteenth Century and for a long time thereafter women customarily accompanied an army on the march. Indeed, the practice continued, in one form or another, for nearly a century. It received statutory sanction in 1802 (Sec. 5 of the Act of March 16, 1802, c. 9, 2 Stat. 132, 134) to the extent of allowing four women per company, each of whom was allowed a ration, to accompany the troops as laundresses. These provisions were duly carried into the Revised Statutes; see R.S. §§1240, 1295. Not until 1878 did Congress finally declare "That hereafter women shall not be allowed to accompany troops as laundresses." Sec. 5 of the Act of June 18, 1878, c. 263, 20 Stat. 145, 150; 10 U.S.C. [1926 through 1952 eds.] §664; omitted as obsolete in 1956, see Sen. Rep. 2484, 84th Cong., 2d sess., p. 1020.

Nevertheless, none of those women appear to have been tried by court-martial, and all the Government can show is two trials of soldiers' wives during the Revolution.

We submit that a mere two such trials in a conflict that lasted longer than any subsequent war in which the United States was engaged hardly establish a settled practice, particularly since, as in those instances, the cases fell within what is now Art. 2(10) (*supra*, p. 28) and could not by any stretch of imagination be included within the

present Art. 2(11). And, in fact, no civilian dependent was tried by court-martial between 1778 and 1950. The Government has found no instances in that 172 year interval in which any civilian women were punished by the military; we can produce two, which however do not advance the Government's arguments.

(c) In 1795, at West Point, a woman not shown to have been the dependent of anyone in the garrison, was whipped without trial. Here is the General Order of 31st July 1795, as recorded in 1 *Orderly Book of the Corps of Artillerists and Engineers* 73-74 (MS., U.S.M.A. Library, West Point, N.Y.).

> "Whereas a woman by name Polly Toomy has been drummed out of the Garrison three times; that the last being yesterday evening she has again returned the same night in defiance of the Garrison orders.
>
> "The Commandant orders that to preserve in this Garrison good order which she infringes upon [,] the said Polly Toomy shall be drummed out again and receive twenty lashes on her bare back, care being taken that her breast shall not be injured.
>
> "The Commandant declares that if she infringes again the orders she will be punished very severely as being a disgrace to society.
>
> "Lewis Tousard."[13]

The other three volumes of *Orderly Books of the Corps of Artillerists and Engineers,* which together with vol. 1 extend from May 7, 1795, to May 19, 1799, have likewise been examined; they reflect no further instances of women being either tried or punished without trial.

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[13] Tousard was a Frenchman by birth who had served in the Continental Army and was at this time a Major. 1 Heitman, 966.

(d) The Orderly Books of Maj. Gen. Anthony Wayne, Commanding General from 1792 to 1796, appear at 34 Mich. Pioneer & Hist. Coll. 341, except for the period Nov. 17, 1792 to 11 April 1793; the missing entries are in manuscript in the library of the Historical Society of Pennsylvania in Philadelphia, and have been examined there.

No trials of women are recorded during the entire period, and the only reference to women appears in a General Order of Dec. 22, 1792, Head Quarters Legionville (in Pennsylvania, on the Ohio River N.W. of Pittsburgh, now in Harmony Tp., Beaver Co.; see map in Wildes, *Anthony Wayne* (1941) 361). That order, after prohibiting the washing of clothes in the creek in the ravine, or anywhere but in the Ohio River, goes on to state:

> "Should any woman or women or other person violate this order, by washing in that ravine—the person or person's so offending—shall be ducked in the river three times for each and every offence."

No action in furtherance of this threat is noted.

As is set out in greater detail in the petitioner *Wilson's* brief in No. 37, Wayne was frequently in conflict with civil authority in Pittsburgh (and elsewhere), and indeed issued an order at this time detailing one of his officers to regulate the prices asked by the inhabitants for their wares because "the market has been forestalled."

Actions taken by Anthony Wayne, therefore, are hardly safe authority when tracing the constitutional limits of military power. Nor, as will be seen, were those of his successor, Brig. Gen. James Wilkinson.

(e) General Wilkinson's orders, from December 31, 1796, to April 23, 1808, appear in the *Wilkinson Order Book* (MS., National Archives), which has been examined.

No trials of civilian dependents appear therein.

One woman, described as a follower of the Army, was tried in the following circumstances:

On July 12, 1797, General Wilkinson issued a General Order from his headquarters, then at "D'Etroit," which stated that "All persons are hereby prohibited selling liquor of any kind to the Troops, except under the written permission of Lieut. Colonel Commandant Strong—the infraction of this order by whosoever committed, shall be punished by the guard House, and the sentence of a General Court Martial." *Wilkinson Order Book* 48.

The foregoing General Order also stated (*id.*) that "Any person attempting to inveigle a soldier from his duty, or in advising him to desert shall receive Fifty lashes, and be drummed out of the fortifications."

On July 20, 1797, a General Court Martial tried three civilians for a violation of the first portion of the foregoing General Order: William Mitchel, a Suttler, Lydia Conner, a follower of the Army, and James Fraser, a Merchant of D'Etroit. With respect to the woman, here are the proceedings as recorded (*id.*, pp. 58-60):

> "3d Lydia Conner a follower of the Army charged with a Violation of the General Order of the 12th Instant pleads not Guilty.
>
> "The Court find the prisoner guilty of the charge exhibited against her, and sentence her, under the General order of the 12th Instant, and the 23 article of the 13 Section of the rules and articles of War, to be drummed with a bottle suspended about her neck, with the rogues March (together with William Mitchel a prisoner convicted of the like Offence, her right hand tied to his left), through the Citadel in front of the Troops paraded, thence through the Streets of the

Town; thence to and around the front of the barracks of the Soldiery in Fort Lernoult,[14] thence out of the Fort, to and along the main Street, and out of the West or South West gate of the town, not to return therein, or within the lines or fortifications of the troops of the United States, on penalty of receiving such punishment as may be inflicted upon her by sentence of a Court Martial. * * *

"The Commander in Chief approves these sentences * * * .

"The Sentence passed upon Lydia Conner, a notorious offender, is to be carried into execution at 6 O'Clock this afternoon."

On July 28, 1797, two more civilians, apparently unconnected with the Army, were tried, one for "enticing and endeavouring to persuade" a soldier to desert, another for selling liquor in violation of the July 12 General Order. *Wilkinson Order Book* 66.

On September 11, 1797, another sutler was tried for improperly selling liquor to soldiers, but was acquitted. *Wilkinson Order Book* 79.

These examples of trials of civilians by court-martial, far from reflecting a settled practice of subjecting camp followers to military jurisdiction, show instead an utterly illegal assumption of legislative and judicial power over civilians. Not only had Congress made the enticing of soldiers to desert a civil offense (Sec. 15 of the Act of May 30, 1796, c. 39, 1 Stat. 483, 485) but Detroit itself was not an unsettled place at this time. To the contrary, it had magistrates and a sheriff. See 2 *The John Askin Papers*

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[14] Named after Major Lernoult of the Revolutionary Army. 1 *Burton Historical Collection Leaflet*, No. 3 (Detroit Public Library, March 1922).

(Quaife ed. 1931) 112-114. There were also civilian justices across the river in Upper Canada, whose help Gen. Wilkinson unsuccessfully sought in apprehending deserters. 2 *id.* 115-117, 118-119.

Some of Wilkinson's interferences resulted in his being sued (2 *id.* 165, note 66), and thereafter either he or a subordinate following his example clashed with higher authority. On March 22, 1799, Secretary of State Pickering wrote Gov. St. Clair of the Northwest Territory as follows (3 *Terr. Pap. of the U. S.* 20-21),

> "The President [John Adams] is absent, in Massachusetts: but I suppose the Secretary of War (to whom I will communicate your letter) can correct the error of the commanding military officer at Detroit, in proclaiming military law, and threatening the inhabitants with punishment by court-martial."

The conclusion fairly to be drawn from the foregoing examples is, not that there was a well established military jurisdiction over a narrow class of civilians accompanying the forces in areas where no civil judicature existed, but rather that General James Wilkinson was a headstrong man, who brooked no interference with his directions; who purported to legislate for the conduct of civilians and assumed military jurisdiction over offenses that Congress had declared punishable only in the civil courts; and who either knew nothing or cared nothing about the boundary within which the Constitution's double guarantee of jury trial had contained the jurisdiction of courts-martial.

Other trials of civilians recorded in the *Wilkinson Order Book*, none of which involved women, are set forth in the *Wilson* brief in No. 37.

(f) Winthrop, whose last edition was published in 1896, collected therein (pp. *131-*137) all of the trials of civilians

found in published court-martial orders up to that date. No trial of any American civilian dependent is listed, nor any of a non-dependent woman.

(g) The only contemporary text on the military law of the Confederacy indicates that trials of civilian dependents were never had or even contemplated by the Confederate States Army. See Lee, *The Judge Advocate's Vade Mecum* (Richmond, 1863) §22:

> "Where offences of a purely military character are committed by such persons, such as insolence to a commissioned officer, disobedience, or neglect of duty, though a court martial could not take cognizance of them, the offender may, nevertheless, be frequently sufficiently punished by dismissal from the camp * * *."

A striking instance of the limitations placed by the courts of the Confederacy on military trials of civilians other than dependents is discussed in the *Wilson* brief in No. 37.

(h) In June 1945, The Judge Advocate General of the Army compiled a long list of instances of civilians tried by court-martial under AW 2(d) of 1916 and 1920 and its statutory predecessors. 4 Bull. JAG 223-229. All were wartime cases, although some probably unduly stretched the concept of "in the field." In no instance there collected had any civilian dependent been tried by court-martial.

(i) In 1947, after the declared end of World War II hostilities (see Jt. Res. of July 25, 1947, c. 327, 61 Stat. 449), The Judge Advocate General of the Army "made a policy decision that military jurisdiction over such dependents [i.e., wives and children of service personnel] would not be exercised in spite of the fact that they were 'accompanying . . . the armies of the United States without the territorial jurisdiction of the United States.'" Aycock and

Wurfel, *Military Law Under the Uniform Code of Military Justice* (1955) 60.

(j) The first occasion under the Constitution when the United States Army tried an unarmed dependent wife came in 1950.

"In case number 340593 Audrey L. Aguaya, a dependent wife, was tried in Japan on 10 February 1950 on a charge of larceny, committed in December 1949. She was convicted and sentenced to six months confinement, which was suspended. In case number 351230, Fumie Okitsu Hilton, a dependent wife, was tried at Osaka, Japan, on 18 January 1952 for unlawful possession of drugs, an offense committed 11 December 1951. Upon conviction she was fined $100, and sentenced to three months confinement, which was suspended." Respondent's reply brief in *Krueger* v. *Kinsella*, S.D. W. Va., H.C. No. 1726, p. 7.

Both trials seem, quite plainly, to have taken place on an *in terrorem* basis; in any event, they represent the first instances of dependent wives being tried by an American court-martial since the Constitution was adopted.

(k) Since the effective date of the Uniform Code, there has been a veritable rash of such trials.

Otherwise stated, the reversal of the traditional policy with respect to the treatment of dependent wives has taken place under color of the legislation through which Congress sought to meet and dispose of continuing criticisms of the administration of military justice. Thus there is presented this unedifying paradox, that whereas for over 170 years no civilian dependent of any American serviceman was ever tried by an American court-martial, now, in consequence of a reformed procedure and jurisdiction evoked by persistent criticism of military trials of persons in uniform, civilian wives have in fact been tried by court-martial—and will

continue to be so tried for most offenses unless the judgment below in this case is affirmed.

The significant point of the foregoing survey is that, *non constat* the Government's arguments (Br. 16-26), there is no historical support whatever for the exercise of military jurisdiction over civilian dependents in time of peace, in respect of any offenses whatever.

Indeed, our views are identical with the conclusions urged on this Court by the Government in *Madsen* v. *Kinsella*, 343 U.S. 341. There the Government, after thorough consideration of the authorities, came to precisely the same conclusion that we do as to the extent of the pre-1916 court-martial jurisdiction over civilian dependents. Here are pertinent extracts from its brief (No. 411, Oct. T. 1951):

> "* * * we will demonstrate that courts martial probably never possessed jurisdiction over the wives and dependents of a soldier, or over any civilian except during a time and in the vicinity of military operations, and that, in any event, prior to 1916 courts martial never had jurisdiction to try a soldier's wife or any other civilians for murder or any of the other serious civil crimes enumerated in Art. 58 of the pre-1916 Articles of War" (p. 30).
>
> "Petitioner's contention that the wives of soldiers were subject to trial by court martial prior to 1916 under the former AW 63 [of 1874; Winthrop, *1531 (reprint, p. 991)] is inconsistent with the terms and construction of that article, and is based upon dubious authority" (p. 44).

Particular attention is directed to Point IB2 of that brief (pp. 40-45), which bears the heading, "Prior to 1916, courts martial probably lacked jurisdiction over any civilians except in an area of combat operations, and clearly were with-

out jurisdiction over soldiers' dependents bearing no relationship to the army as a fighting force." We commend that discussion to the Court, not by way of debating point, not to impeach an adversary with prior inconsistent statements, but because those pages contain a reasoned and accurate exposition of the pre-1916 military jurisdiction over civilians, and because the conclusions there set forth are those which any objective lawyer, familiar with the materials, is bound to reach.

We should add, those are similarly the conclusions that any competent historian would reach from the historical evidence: That evidence shows precisely four instances, all prior to 1800, of women being punished by the United States Army: Two trials of women at Valley Forge, in the camp of the Continental Army during the midst of the Revolutionary War; one woman flogged without trial at West Point in 1795; and one woman drummed out of camp at Detroit in 1797, in a community where civil magistrates were sitting.

The first two instances fell clearly within the limited wartime exception already discussed at length; the second two were palpably illegal. Yet that is the "solid basis" (Pet. Br., No. 21, p. 28) and "well-established practice" (U.S. Br., this case, p. 15) on which the Government now relies to sustain military jurisdiction over civilian dependents in time of peace!

2. *The English precedents do not reflect any wider jurisdiction.*

The Government's treatment of selected English "historical" precedents (Pet. Br., No. 21, pp. 28-33; U.S. Br., this case, pp. 16-23) requires that those materials be supplemented and, above all, viewed in their proper setting and not in a vacuum.

At the outset, it is well to recall an accepted paradox of American constitutional law, that while "the provisions of the Constitution * * * are organic living institutions transplanted from English soil" (*Gompers* v. *United States*, 233 U.S. 604, 610), the state of the English law from 1776 to 1789 is frequently not an accurate measure of the meaning of the Constitution of the United States. Examples that come readily to mind are the guarantee of the right to counsel in its due process setting (*Powell* v. *Alabama*, 287 U.S. 45), as compared with the English practice, where prior to 1836 (St. 6 & 7 Will. IV, c. 114) only persons accused of treason were permitted counsel; and the extent to which government may impinge on the freedom of the press (*Grosjean* v. *American Press Co.*, 297 U.S. 233, 248-249), where the English law of libel was held not to measure the breadth of the First Amendment's guarantee as carried into the Fourteenth.

Similarly, it is necessary to be circumspect in attempting to read into American constitutional law all of the British holdings and practices relating to military jurisdiction. Even though, as is well known, the first American Articles of War were taken verbatim from a British counterpart, British institutions and ours were so significantly different even at the outset, that it is neither safe nor accurate to pursue analogies to their logical limits. And this is still so, even though (as will be shown) the scope of British military jurisdiction over dependents was not in any sense wider than ours prior to 1957. Today, of course, in a number of respects enumerated below, British military jurisdiction is markedly different from that which obtains under the Constitution of the United States.

(a) John Adams, who drafted the 1776 Articles of War that were adopted by the Continental Congress, copied them almost literally from their British prototypes. 3

Works of John Adams (C. F. Adams ed. 1851) 68-69, 83-84. (He had earlier drafted the Continental Articles for the Government of the Navy. 1 *id.* 188; 3 J. Cont. Cong. 277.).

It is unnecessary in this connection to determine whether Adams' model for the American Articles of War of 1776 were the British Articles of 1765 or those of 1774 (cf. Davis, *A Treatise on the Military Law of the United States* (3d ed. 1915) 340-341, espy. 341, n. 1), inasmuch as the British provisions dealing with military jurisdiction over civilians were the same in both sets. They read as follows:

> "All Suttlers and Retainers to a Camp, and all Persons whatsoever, serving with our Armies in the Field, though no inlisted Soldiers, are to be subject to Orders according to the Rules and Discipline of War."

(Section 14, Art. 23 of the British Articles of 1774, Davis, *supra*, p. 593; Section XIV, Art. XXIII, of the British Articles of 1765, Winthrop *1461.)

This provision, with the sole substitution of "armies of the United States" for "Our Armies," became Art. 23 of Section XIII of the American Code of 1776 (*infra*, p. 113).

The scope of the British provision as actually applied was, like that of the American one (*supra*, pp. 28-33), limited to civilians "in the field," a phrase of art that meant a time and place where military operations were actually in progress. As we shall show, not a single one of the precedents adduced by the Government extends beyond that limitation.

(b) Arguments by analogy from other provisions of the British Articles of War, however, cannot be carried farther, for while the power to enact Articles of War was in the United States always vested exclusively in Congress (Articles of Confederation, Art. IX, ¶4; U.S. Const., Art. I,

Sec. 8, Cl. 14), in England that power was divided between the King and Parliament. Parliament enacted the so-called statutory articles; the King prescribed what became known as prerogative articles.

The English development in this respect is conveniently traced in the 1929 edition of the British War Office's *Manual of Military Law*, pp. 12-14. The short of a long history is that the Mutiny Act and the statutory articles regulated the Army at home, while the troops abroad were governed by the prerogative articles.

In 1766, it was held in *Barwis* v. *Keppel*, 2 Wils. K. B. 314, that the King's power overseas was unlimited. That was an action by a sergeant against a major for wrongfully reducing him to the ranks while serving in Germany. The Court held that it had no jurisdiction whatever, saying (p. 318):

> "By the Act of Parliament to punish mutiny and desertion the King's power to make articles of war is confined to his own dominions; when his army is out of his dominions, he acts by virtue of his prerogative, and without the statute or articles of war; and therefore you cannot argue upon either of them, for they are both to be laid out of this case, and flagrante bello, the common law has never interfered with the army: inter arma silent leges. We think (as at present advised) we have no jurisdiction at all in this case; * * * "

Not until 1803 (St. 43 Geo. III, c. 20) were the Mutiny Act and the statutory Articles of War extended to the army whether within or without the King's dominions. By that act, as well as in 1813 by Sec. 146, St. 53 Geo. III, c. 17, the prerogative power of making Articles of War in a time of war was finally superseded by a statutory power.

Very plainly, the existence of an untrammeled royal power outside the realm does not yield arguments that are either useful or helpful when sought to be applied here, where "The Constitution of the United States is in force * * * wherever and whenever the sovereign power of that government is exerted." *Balzac* v. *Porto Rico*, 258 U.S. 29, 312; and see *Reid* v. *Covert*, 354 U.S. 1, 5-6, 12, 42, 66-67. Accordingly, the British provisions cited and relied upon by the Government at Pet. Br., No. 21, pp. 32-33, 53, which on their face purport to grant a broader power overseas, are completely inapposite in the four cases now before the Court.

(c) Yet there was an Act of Parliament—not cited by the Government—which advisedly refused to extend military jurisdiction over civilians at forts or garrisons in the sparsely settled portions of the vast regions of North America to which British title was perfected by the Peace of 1763. That Act, instead, required military commanders to turn civilian offenders over to the civil authorities in the nearest adjoining colony. That is to say, the Act waived only venue, and preserved civilian trials for civilian offenders.

The St. 5 Geo. III, c. 33 (1765) was entitled "An Act to amend and render more effectual, in His Majesty's Dominions in *America*, an Act passed in this present Session of Parliament, intituled, *An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters.*"

Sec. XXV of this Act was as follows:

> "And whereas several Crimes and Offences have been, and may be, committed by several Persons, not being Soldiers, at several Forts or Garrisons, and several other Places within His Majesty's Dominions in

America, which are not within the Limits or Jurisdiction of any Civil Government there hitherto established; and which Crimes and Offences are not properly cognizable, or triable and punishable, by a Court-martial, but by the Civil Magistrate; by Means whereof several great Crimes and Offences may go unpunished, to the great Scandal of Government; For Remedy whereof, be it further enacted * * * That * * * if any Person or Persons, not being a Soldier or Soldiers, do or shall commit any Crime or Crimes, or Offence or Offences, in any of the said Forts, Garrisons, or Places, within His Majesty's Dominions in America, which are not within the Limits or jurisdiction of any Civil Government hitherto established, it shall and may be lawful for any person or persons to apprehend such Offender or Offenders, and to carry him, her, or them, before the Commanding Officer for the time being of His Majesty's Forces there; and such Offender being charged upon Oath in Writing, before the said Commanding Officer, and which Oath the said Commanding Officer is hereby impowered to administer, that then, and in every such Case, the said Commanding Officer shall receive and take into his Custody, and safely keep, every such Offender, and shall convey and deliver, or cause to be conveyed and delivered, with all convenient Speed, every such Offender to the Civil Magistrate of the next adjoining Province, together with the Cause of his or her Detainer, to be committed and dealt with by such Civil Magistrate or Magistrates according to law; and every such Civil Magistrate is hereby commanded and required to commit every such Offender, that he or she may be dealt with according to Law; and in every such Case, it shall and may be lawful to prosecute and try every such Offender in the Court of such Province or

> Colony, where Crimes and Offences of the like Nature are usually tried, and where the same would properly be tried in case such Crime or Offence had been committed within the Jurisdiction of such Court; and such Court shall and may proceed therein to Trial, Judgment, and Execution, in the same Manner as if such Crime or Offence had been really committed within the Jurisdiction of such Court; any Law, Usage, Custom, Matter, or Thing whatsoever to the contrary notwithstanding."

The foregoing Act was several times extended; see St. 6 Geo. III, c. 18; St. 9 Geo. III, c. 18.

It is hardly necessary to add that the quoted statutory provision completely demolishes the Government's arguments that the British Articles of War of 1765 "applied to all 'persons' under the command of the Commanding Officer, in time of peace as well as war," "where there is no Form of our Civil Judicature in Force" (Pet. Br., No. 21, p. 53), or that "the historical concept of 'in the field' does not turn on peace or war but rather on the location of the military as a group apart in a defensive or offensive posture, or away from its own civil jurisdiction."

(d) The Government cites Clode, *Military Forces of the Crown* (1869), see Pet. Br., No. 21, pp. 29, 30, 32, but wholly overlooks some highly pertinent passages from the same learned author's other work, *The Administration of Justice under Military and Martial Law* (1st ed. 1872; 2d ed. 1874). Accordingly, we supply those excerpts here (pp. 94, 95, 2d ed. 1874):

> "However, for many years (from 1744 to 1828) the Articles of War declared all 'Sutlers and Retainers to a camp to be subjected to the rules and discipline of War,' though it was clear from the Law Officers' Re-

port in 1744-5 that they could not be punished by Court-martial, because they were neither designated in the Articles nor were they Officers or Soldiers. Had the Crown see fit to commission or enlist—or even to pay them 'as Officers or Soldiers'—this liability would then have attached to them. [Citing *Grant* v. *Gould*, 2 H.Bl. 69.]

* * * * * * *

"From what has already been written, the reader, perhaps, need not be cautioned against supposing that all those who are resident or commorant within a Camp or Barrack are thereby rendered liable to trial by Court-martial. Such a liability must be found upon the Statute Book in plain and explicit words leaving nothing to inference. [Citing *Looker* v. *Halcomb*, 4 Bing. 183, 188-189.]"

and, in the United States, must be found in the Constitution.

The foregoing passages from Clode make it plain that the quotation from Samuel, *Historical Account of the British Army, and of the Law Military* 691-692 (Pet. Br., No. 21, pp. 31-32), must be read with caution, and that it applies, as indeed no doubt it was intended to apply, only to the situation existing "in the field."

(e) Certainly it is plain that every case of the trial by British court-martial of a civilian dependent or of a woman prior to 1789 cited by the Government in this case (Br. 20-23) falls within the narrow "in the field" limitation always rigidly insisted on by American military lawyers prior to 1916.

For reasons already set forth above, p. 59, no particular significance attaches to the undoubted fact that women regularly accompanied the British Army through at least the Peninsular War. Such women were of course

issued rations—plainly they would not be permitted to starve—and they were subject to regulation of their activities, as indeed today the commanding officer of every American military installation regulates and prohibits many actions of dependents living on the post without having the slightest power to try them by court-martial.

What is significant in the present connection is, accordingly, only the nature and extent of the military jurisdiction that was exercised over these British women.

(i) Six of the cases cited by the Government (U.S. Br. 22-23) were, on their face, instances occurring in time of war and "in the field."

(ii) Another case, the trial of a soldier's wife in Boston in December 1775 (U.S. Br. 22), took place when the British forces in that town were besieged by the Continental Army (Spaulding, *The United States Army in War and Peace*, 36-40, 44-46), and after General Gage, the British commander and, simultaneously, Governor of the royal Province of Massachusetts Bay, had declared martial law in a proclamation which recited that the civil courts were not functioning. Force, *American Archives*, Fourth Series, Vol. II, 968, 970.[13]

In terms of modern concepts, this was an appropriate martial law situation, a trial by military tribunals at a time when disorders had closed the common law courts.

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[13] "And whereas, during the continuance of the present unnatural rebellion, justice cannot be administered by the common law of the land, the course whereof has for a long time past been violently impeded, and wholly interrupted (from whence results a necessity of using and exercising the Law-Martial), I have therefore thought fit, by the authority vested in me by the Royal Charter to this Province, to publish, and I do hereby publish, proclaim and order the use and exercise of the Law-Martial, within and throughout this Province for so long time as the present unhappy occasion shall necessarily require; * * * ." The date of the Proclamation was June 12, 1775.

Cf. *Duncan* v. *Kahanamoku*, 327 U.S. 304. But, apart from that aspect, which as sought to be applied to the 1770's might involve inadmissible after-thinking, it is plain that Boston in the last half of 1775 was under siege, that there was shooting, and that hence, here also, the trial took place in a time of war "in the field" (*supra*, pp. 28-33).

Another Boston trial from the same period of siege (U.S. Br. 20) is quoted from Blumenthal, *Women Camp Followers of the American Revolution* 42, without any indication of its source. The case is not further documented, either by the author of that distinctly less than authoritative work, or by the Government. If we are safe in assuming that this particular example was accurately transcribed by Mr. Blumenthal from an authentic original, then obviously it falls into the same category as the one just discussed, and, very plainly, does not represent an instance of military jurisdiction exercised over civilian dependents in time of peace.

(iii) The two trials of soldiers' wives in Canada in 1760 and 1761 (U.S. Br. 22), did not, as the Government there asserts, occur in time of peace, inasmuch as the French and Indian War did not terminate until 1763. Consequently, since title to Canada had not yet passed to Britain, that region was occupied enemy territory, and accordingly subject to the laws of war, certainly if applied without discrimination. *Madsen* v. *Kinsella*, 343 U.S. 341.

It follows that the jurisdiction exercised by the British prior to 1789 over civilian dependents and women camp-followers is not shown to have extended beyond the "in the field" limitation that was traditional to Colonels Winthrop and Dudley, to General Davis, and to all Attorneys General and Judge Advocates General prior to 1916.

The Government's attempt to draw a wider significance from this handful of British trials on the basis that, "from

the British point of view at least, there was no war, but merely disorder in the colonies" (U.S. Br. 18-19), breaks down utterly when it is borne in mind that the British accorded full belligerent rights to the American forces, and treated captured American soldiers as prisoners of war, not as traitors levying war against the King. Similarly, although the Civil War took place on domestic soil, the United States at all times extended belligerent rights to the Confederacy (e.g., *Williams* v. *Bruffy*, 96 U.S. 176, 186-187).

Once again, the Government has signally failed to show a "well-established practice" of court-martial jurisdiction over civilian dependents in time of peace.

(f) Thereafter, the British Mutiny Act was always narrowly construed, see *Wolton* v. *Gavin*, 16 Q.B. 48, 61, 70, and accordingly military jurisdiction thereunder was, like that under the American Articles of War prior to 1916, rigidly confined. There was no broadening of that jurisdiction when, late in the XIX Century, the Mutiny Act was superseded, and Articles of War were no longer promulgated. Army Discipline and Regulation Act, 42 & 43 Vict., c. 33; Army Act, 1881, 44 & 45 Vict., c. 58.

The latter measure, now known simply as the Army Act, is annually reenacted in compliance with British constitutional principles, and, by such reenactment is from time to time amended. Under the Army Act, as it was in force down to the end of 1956, certain civilians, not otherwise subject to military law, were so subject as officers if one "accompanies in an official capacity equivalent to that of an officer any of [Her] Majesty's troops on active service in any place" (§175(7)); and the following were so subject as soldiers: "All persons not otherwise subject to military law who are followers of or accompany [Her] Majesty's troops, or any portion thereof, when employed

on active service:" §176(10). The expression "on active service" was defined by §189(1) to mean "whenever he is attached to or forms part of a force which is engaged in operations against the enemy or is engaged in military operations in a country or place wholly or partly occupied by an enemy, or is in military occupation of any foreign country." See *Manual of Military Law, 1951* (H.M.S.O.) 392, 395, 414, giving the text of the Army Act as it then stood.

That is to say, under the British military code, accompanying civilians in occupied territory were subject to military law. Other accompanying civilians were subject thereto only when the force which they accompanied was engaged in military operations. Otherwise stated, until the end of 1956, British military jurisdiction over civilians was identical with ours: *Madsen* v. *Kinsella*, 343 U.S. 341, is the American precedent under the first heading, Art. 2(10), UCMJ, is the American counterpart under the second.

Since both countries had common background of implacable hostility to excesses of military authority, since the written military code of each had an identical starting point, it is therefore hardly surprising that in both countries the boundary between civil and military jurisdiction remained similarly identical for so many, many years.

(g) It is only since January 1, 1957, that accompanying civilians have become subject to British military law under conditions other than "on active service," and even then there are disciplinary provisions which are in terms inapplicable to them. See The Army Act, 1955 (3 and 4 Eliz. II, c. 18) §§209, 213, and Fifth Schedule; The Air Force Act, 1955 (3 & 4 Eliz. II, c. 19) §§209, 211, and Fifth Schedule. But since, of course, the British Parliament is not subject to constitutional restrictions, the traditional bound-

aries of British military jurisdiction are far more significant in the present connection than this very recent expansion can possibly be.

(h) Accordingly, we end our survey of the British law military where we began, with the instances in which it differs markedly from our own. Those differences are particularly notable at the present time.

(1) Thus, notwithstanding the 1955 statutes just cited, American law as to military jurisdiction over dependents is significantly more narrow. *Reid* v. *Covert*, 354 U.S. 1.

(2) The British law has a recapture provision similar to the one declared unconstitutional in *Toth* v. *Quarles*, 350 U.S. 11; see 350 U.S. at pp. 29-31, note 11.

(3) The *Hirshberg* case (*United States* v. *Cooke*, 336 U.S. 210) would have been decided differently as a matter of British law; see the British statutes cited by the Government in that case (Resp. Br., No. 231, Oct. T. 1948, p. 13, n. 4).

It is a tribute to the Government's perseverance, if not indeed to its professional judgment, that it refuses to abandon, and still puts forward energetically, the trials by court-martial in British India of two reputed wives of soldiers in 1825, and the 1831 "instance in Delhi in which court-martial of an officer's wife *was considered*" (U.S. Br. 27-28; italics ours).

In view of the circumstance that all of these instances came long after the adoption of the Constitution of the United States, and that they involved the application of a special Mutiny Act operative only in India (St. 4 Geo. IV, ch. 81), we think it too plain for argument that they are completely irrelevant here. For, as the Solicitor General told this Court in *Madsen* v. *Kinsella* (U.S. Br., No. 411, Oct. T. 1951, pp. 44-45),

"the status of the wife or alleged wife of an English soldier in India in 1825 has little bearing as to whether the wife of an American soldier was regarded as subject to court-martial jurisdiction then or later."

The circumstance that the Government now stresses the 1825 situation in India which in 1956 it mentioned briefly (Appellant's Br., No. 701, Oct. T. 1955, 34, n. 16), and in 1952 dismissed as irrelevant reflects, we think, not the suddenly inflated significance of the British military jurisdiction in the days of the East India Company's vice-regal sovereignty, but rather the paucity of authorities from any other source that are available for citation in support of the Government's position in the present case.

British Indian military precedents, it should scarcely be necessary to add, are to be treated with caution. After all, that was the service where, after the suppression of the 1857 mutiny, "Mutineers were blown from the mouths of cannon, sometimes alive, or their bodies sewn up in the skins of cows and swine." 4 Churchill, *A History of the English-Speaking Peoples* (1958) 87.

F. *On no permissible view of its scope does the Necessary and Proper Clause expand Clause 14 so as to include civilian dependents within or as a part of the "land and naval Forces" so as to render them subject to military jurisdiction in time of peace.*

One of the issues that divided the Court in *Reid* v. *Covert* was the proper construction of the Necessary and Proper Clause. Under one view then expressed, that Clause could not enlarge the content of "land and naval Forces" in Clause 14. Under another view, the Necessary and Proper Clause must be read as an integral part of each of the preceding 17 clauses of Article I, Section 8.

In our view it is unnecessary to resolve this difference of opinion, because on either footing the result is the same for the present case. For at least three basic reasons, about to be stated, the Necessary and Proper Clause, howsoever construed, does not legalize military trials of civilian dependents in time of peace.

1. *Even if Clause 14 is to be considered as incorporating Clause 18, the combination of both is still amended and limited by the guarantee of jury trial in the Bill of Rights.*

First. For present purposes, we assume *arguendo* that Clause 18, the Necessary and Proper Clause, is to be read as an integral part of Clause 14, so that "land and naval Forces" in the latter is deemed to include all others whom Congress and the Executive might deem it desirable to subject to military law. That was, indeed, the argument advanced by the Government at the *Covert* rehearing. There the Solicitor General said,

> "The decision whether civilians overseas are a necessary part of our armed forces and whether practical necessity requires that they be subject to military authority is primarily one for the executive and legislative branches of our government." Supp. Br. for Appellant and Petitioner on Rehearing, Nos. 701 and 713, Oct. T. 1955, pp. 39-40.

But that contention did not prevail, nor could it have, since it ignored the Bill of Rights. The very purpose of the first Ten Amendments, it should hardly be necessary to recall to mind, was to curb the powers of the new central Government, and to forbid encroachments on its part upon carefully particularized areas of basic liberty. As Chief Justice Marshall, himself an active participant in the ratifying process, said in *Barron* v. *Baltimore,* 7 Pet. 243, 250,

> "But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.
>
> "In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States."

Otherwise stated, the Sixth Amendment was adopted to preclude success for the very arguments advanced by the Government in *Reid* v. *Covert*, arguments that it now repeats here.

Plainly, the Sixth Amendment would forbid a joint court-martial of Mrs. Dial and her soldier husband if the offense charged against them had been committed in the United States. We do not understand the Government seriously to assert the contrary, and yet that very concession completely undercuts the notion that the Necessary and Proper Clause so expands the content of "land and naval Forces" as thereby to erode the protections of the Sixth Amendment.

We assume that, after *Reid* v. *Covert*, it is no longer necessary to explain that the constitutional position in this

respect is not varied by the circumstance that the United States in this case sought to try one of its civilian citizens without a jury at an overseas location.

Second. This Court has repeatedly held, the last time only two Terms ago (*Green* v. *United States*, 356 U.S. 165), that the right to a jury trial preserves both the scope and the incidents of a jury trial as both stood in 1789. *Callan* v. *Wilson*, 127 U.S. 540; *Thompson* v. *Utah*, 170 U.S. 343; *Rassmussen* v. *United States*, 197 U.S. 516; *Patton* v. *United States*, 281 U.S. 276; *District of Columbia* v. *Colts*, 282 U.S. 63; cf. *Andres* v. *United States*, 333 U.S. 740. Consequently, Clause 18 cannot enlarge the scope of "land and naval Forces" of Clause 14, since to do so would correspondingly diminish the sweep of the Sixth Amendment. Not only must Clauses 14 and 18 be construed together with the guarantee of a jury trial in Art. III, Sec. 2, but, in any event, both are limited by the guarantees of the Sixth Amendment. That construction and, preeminently, that limitation, can only be effectuated by carrying forward without change the boundary between civil and military jurisdiction as that boundary had been authoritatively recognized in 1789 and before, when no American civilian dependent was ever triable—or tried—by court-martial except in time of war and in a theater of actual operations.

In no case of which we are aware has this Court ever held the Necessary and Proper Clause to impinge upon a single personal guarantee contained in the Bill of Rights. True, Congressional power has been enlarged; obstructions to the exercise of such enlarged power have been prevented and punished; and with each increase of Federal power there has necessarily been a corresponding diminution of the power of the several States. Were it otherwise, as Marshall wrote Story a month after *M'Culloch* v. *Maryland*, "the Constitution would be converted into the old Con-

federation" (14 *Proc. Mass. Hist. Soc.*, 2d series, 325). But never, in any decision of this Court of which we are aware, has the operation of the Necessary and Proper Clause been permitted to erode a single one of those personal liberties that were and are guaranteed by the first Eight Amendments.

The proposition just set forth is well illustrated by *McKinley* v. *United States*, 249 U.S. 399. During World War I, Congress authorized the Secretary of War to make regulations to suppress houses of ill-fame in the vicinity of military camps, and plaintiffs in error were convicted of keeping such a house within 5 miles of a camp, in violation of the regulations. Plainly, since Congress is empowered to raise and support armies, it may do whatever is necessary to protect the health and welfare of those armies, however much its legislation and the regulations promulgated pursuant thereto might impinge on what would otherwise be the subject of the police power of the States exclusively. (See *Keller* v. *United States*, 213 U.S. 138.) This Court accordingly sustained the conviction. But it does not follow that the Necessary and Proper Clause could empower Congress to subject the keeper of the house of ill-fame, or its inmates, to trial by court-martial.

The distinction is further illustrated by the Espionage Act cases of World War I, which upheld convictions for attempts to obstruct recruiting by words of persuasion (*Schenck* v. *United States*, 249 U.S. 47; *Frohwerk* v. *United States*, 249 U.S. 204), inciting to insubordination (*Debs* v. *United States*, 249 U.S. 211), and spreading false reports to promote the success of the enemy (*Schaefer* v. *United States*, 251 U.S. 466). See also *Abrams* v. *United States*, 250 U.S. 616. The constitutional basis of the foregoing cases—apart from the scope of the First Amendment, which divided the Court in the last two decisions cited—was that

since Congress had power to raise and support armies and to declare war, it had in addition all power necessary and proper to carry those enumerated powers into execution by punishing obstructions to their exercise. Here again, it does not follow that the Necessary and Proper Clause empowered Congress to try the defendants in question by court-martial—and in respect of activities such as theirs such a course was actually proposed.

In April 1918, Senator Chamberlain, then Chairman of the Committee on Military Affairs, introduced a bill that proposed to declare to be spies, triable by court-martial or military commission, and punishable by death, "any person * * * who shall, anywhere in the United States, in time of war, endanger or interfere with the * * * successful operations of the land or naval forces of the United States, (a) by causing or attempting to cause insubordination * * * or (b) by delivering or transmitting * * * to any member of such land and naval forces any written or printed matter which shall support or favor the cause of the enemy countries or of its allies in the war, or which shall contain any false reports or false statements intended to interfere with the successful operation of such land or naval forces, or (c) by printing or publishing any such printed matter * * *." S. 4364, 65th Cong., 2d sess. See 56 Cong. Rec. 5120, 5401-5402, 5471-5472.

President Wilson wrote of the measure, "I think that it is not only unconstitutional, but that in character it would put us upon the level of the very people we are fighting and affecting to despise. It would be altogether inconsistent with the spirit and practice of America * * *." That killed the bill. Rankin, *When Civil Law Fails*, 138-139.

These illustrations show, we think, both the scope and the limitations of the Necessary and Proper Clause. Nothing in that clause, we submit, can operate to extend the scope

of trial by court-martial at the expense of the guarantee of jury trial.

2. *In view of the widespread hostility to standing armies at the time of the adoption and ratification of the Constitution, it is plain that the Founders did not intend to confer upon the new Government any power to court-martial civilian dependents in time of peace.*

The Government's suggestion (Pet. Br., No. 21, pp. 41-46, espy. 43-44) that what was feared by large segments of the community in 1787-1791 was essentially a standing army in the hands of the executive, and that such fears were allayed once control of the military was entrusted to Congress, again involves a demonstrable misreading of indisputable historical evidence.

Many influential and thoughtful American patriots at that time feared a standing army in any form. Indeed, the distinction now adverted to was only urged by the proponents of the new Constitution after it had been submitted by the Convention to the States, in order to allay the apprehensions of their opposition. E.g., *The Federalist*, No. 24; 5 Elliot 442-443.

Indeed, it is not at all unlikely that, if the supporters of the new instrument of government had even faintly intimated the construction of that document now urged on this Court by the Government, the Constitution would never have been ratified.

First: The fragmentary nature of the materials adduced by the Government renders it appropriate that we set forth the historical evidence in detail.

(a) In 1784, Elbridge Gerry offered in the Continental Congress a resolution solemnly declaring (27 J. Cont. Cong. 518) that "standing armies in time of peace, are in-

consistent with the principles of republican Governments, dangerous to the liberties of a free people, and generally converted into destructive engines for establishing despotism." At this time, the standing army numbered 80 men. 27 J. Cont. Cong. 524.

And, since there was no Executive at this time, under the Articles of Confederation, it is plain that Gerry's fears of a standing army were not limited to a force under executive direction.

(b) In the Convention, Elbridge Gerry attempted, for all time, to limit the standing army to two or three thousand men. 2 Farrand, 323, 329, 330; Warren, *The Making of the Constitution*, 482-484.

(c) Luther Martin left the Convention before it completed its work, and then opposed the Constitution because, among other things, it provided for an army in time of peace. 3 Farrand, 207; 12 Dict. Amer. Biog. 344.

(d) George Mason stayed to the end, but refused to sign the Constitution because, among other things, it provided for a standing army. 2 Farrand, 640.

(e) From Paris, where he was American Minister, Jefferson urged a Bill of Rights which would afford "protection against standing armies." 12 *The Papers of Thomas Jefferson* (Boyd. ed.) 438, 440; 13 *id.* 440, 442, 443.

(f) After the Constitution was presented to the States for ratification, numerous amendments were proposed either to prohibit a peacetime standing army altogether or else to permit it only under strict limitations. Thus, Rhode Island, Virginia, and North Carolina each proposed a declaration of rights asserting that standing armies in time of peace were dangerous to liberty (1 Elliot 335 [No. XVII]; 3 *id.* 660 [No. 17]; 4 *id.* 244 [No. 17]). The same

three States proposed amendments against maintaining such forces in the absence of a two-thirds vote by Congress (1 *id.* 336 [No. XII]; 3 *id.* 660 [No. 9]; 4 *id.* 245 [No. 9]). New York proposed an amendment against any standing army except in cases of necessity (1 *id.* 328), and Maryland one to the effect that no mutiny bill should continue in force longer than two years (2 *id.* 552).

(g) After the Constitution went into effect, the enactments of the First Congress for a small increase in the army on the frontiers (Act of Sept. 29, 1789, c. 25, 1 Stat. 95; Act of April 30, 1790, c. 10, 1 Stat. 119) were still assailed by some of the members as utterly unconstitutional. *The Journal of William Maclay* (1927 ed.) 221, 235.

The foregoing six items, (b) to (g) inclusive—most of them not mentioned by the Government—seem to us conclusively to demonstrate that the widespread hostility to standing armies in the United States at the time of the adoption and ratification of the Constitution was in no sense limited to such an army when controlled by the Executive, but existed as well when it was perfectly clear that the standing army was subject to Congressional regulation.

In that setting, if "land and naval Forces" had ever been intended as—or even suspected of being capable of interpretation of—"a broad grant susceptible of expansion under changing circumstances" (352 U.S. at 902); if, specifically, the impact of Clause 18 could ever have been imagined as expanding Clause 14 to include therein, in time of peace, the civilian dependents of land and naval forces, it is simply inconceivable that this possibility would ever have been passed over in silence by all of the articulate anti-Federalists, as in fact it was.

That group was not slow to conjure up lurid pictures of imaginary horribles in respect of the Militia Clause, Clauses

15 and 16; see 3 Farrand 207-209 (Luther Martin); 3 Elliot 47-48, 51-52, 169, 410 *et seq.* (Patrick Henry).[16] The circumstance that no one, whether Federalist, Anti-Federalist, or simply *dubitante*, ever envisaged that the Constitution under any construction rendered civilian dependents triable by court-martial simply because of proximity and dependency, is surely eloquent evidence that no such exercise of military jurisdiction was ever in the contemplation of anyone.

Second: The Founders could not have been unaware that, in July 1787, at a time when the Constitutional Convention was in session (Farrand, *The Framing of the Constitution, passim*), the Continental Congress passed the Northwest Ordinance to establish civil government and civil courts in the Northwest Territory, and refused to adopt proposals that would have given courts-martial power to try civilians in that area even temporarily, until such time as the new territorial government was able to function.

The constitutional significance of that determination is highlighted by the dramatic circumstance that both plans, the one urging trials by court-martial, the other proposing the establishment of a system of civil judicature, were presented on the same day.

On July 11, 1787, the Continental Congress received a report on Indian hostilities from General Knox, then Secretary at War (32 J. Cont. Cong. 327-332), which suggested *inter alia* that (*id.*, 330) the commanding officer of the federal troops in the territory of the United States northwest of the river Ohio "should also be empowered to main-

[16] E.g., "Your militia is given up to Congress; all power will be in their own possession." "By this, sir, you see that their control over our last and best defense is unlimited." 3 Elliot's *Debates* 51, 52.

tain the said peace as far as the authority or interests of the United States should be concerned. That for this purpose he should have the power to confine and try all persons who should within the jurisdiction of territory of the United States injure or kill any of the indians or otherwise infract the treaty."

On July 11, 1787, likewise, a committee of the Congress submitted a first draft of the Northwest Ordinance. 32 J. Cont. Cong. 313-320.

On July 13, 1787, Congress adopted the Northwest Ordinance and established a civil government for the Northwest Territory, with a full complement of civil courts. 32 J. Cont. Cong. 334; 2 *Territorial Papers of the U. S.* 39. So significant was this action that, even today, the Northwest Ordinance is regarded as one of the Organic Laws of the United States. See vol. 1, U.S.C. (official 1958 ed.) **xxxvii.**

Six days later, the committee to which General Knox's proposal had been referred submitted a report thereon (32 J. Cont. Cong. 370), which proposed military trials of offenders against the Indians until such time as the government authorized by the Northwest Ordinance should be established (*id.* at 374):

> "And any persons unlawfully passing in the same [the territory of the United States north west of the river Ohio] without such permit or who shall therein murder any indian or injure him in his person or property shall be arrested by the Officers commanding the troops—and tried and punished in all cases prior to the establishment of civil law in the said territory for the prevention of offences, by law martial in the same manner as the regular soldiers are tried and punished for the like offences."

This proposal was debated over several days, somewhat inconclusively, after which it appears to have been referred to the Committee on Indian Relations (32 J. Cont. Cong. 376, 385-387). On July 26, 1787, that committee in turn presented another report, which restated the former proposal in somewhat greater detail. It read in pertinent part as follows (32 J. Cont. Cong. 410-411; 2 *Terr. Pap. of the U. S.* 56-57:

> "* * * but as there is, at present, no system of civil law established in the territory of the United States North west of the river Ohio, whereby the conduct of individuals can be controuled, or their offences or Crimes prevented or punished therein, the committee conceive, that, however it ought, in general, to be an object with Governments to try and punish offenders, not in military service, according to the Course of the civil laws of the land, yet, until such laws can be established in that territory, it is highly expedient, in the present State of things there, to try and punish offenders, who shall make unauthorized attacks upon the Indians, by such laws as can be carried into effect and with such dicision as to Stop the further progress of the lawless proceedings of individuals towards the Indians—
>
> "Wherefore the Committee submit the following resolves.
>
> "Resolved [that anyone found among the Indians in the Northwest Territory without a permit signed by the Secretary at War, the Superintendent of Indian affairs in the Northern Department, or the commander of federal troops or not licensed under the resolve of August 7, 1786 (31 J. Cont. Cong. 490; 2 *Terr. Pap. of the U. S.* 19)] shall be arrested by the officers commanding the federal troops, confined not exceeding 8 days, and sent to the frontiers of one of the States,

and for a second or third offence shall be liable to be Whipped not exceeding forty Stripes—

"And if any person in the said territory not otherwise liable to be punished for his or her offences shall kill, wound, assault or beat any Indian; destroy, secretly, or forceably, take away his or her property without lawful authority such person shall be arrested, confined, tried, and punished in the same manner as the soldiers in the actual service of the United States in the said territory, may be arrested, confined, tried and punished for like offences—and this law for punishing wrongs done to the Indians shall remain in force until other laws shall be made for trying and punishing the same—"

Otherwise stated, successive Committees of the Continental Congress were proposing in 1787 an extension of military jurisdiction over civilians that not even the Parliament of King George III which had passed the notorious Stamp Act (St. 5 Geo. III, c. 12) had been willing to assert in the identical areas twenty-two years earlier; see St. 5 Geo. III, c. 33, quoted *supra* at pp. 72-74.

It will hardly occasion surprise that no further action was taken on a proposal so inconsistent with traditional Anglo-American standards of civil supremacy. For Congress by adopting the Northwest Ordinance had reaffirmed the concept that civilians were entitled to civilian trials, and were not to be subjected, even temporarily, to the jurisdiction of courts-martial, simply because of considerations of expediency or of asserted necessity.

It is appropriate to note that, in fact, the territorial government in the Northwest Territory did not begin to function until July 1788, a full year later (see address of Gov. St. Clair to the inhabitants at Marietta, 3 *Terr. Pap. of*

the U. S. 263; and their reply, 2 *id.* 133), and that no crimes act was adopted for the area until September 6, 1788 (1 *Stat. Ohio & N.W. Terr.* (Salmon P. Chase ed. 1833) 97-101). Or, otherwise stated, Congress chose a hiatus of law on the frontier in preference to subjecting civilians there to military law until civil jurisdiction could be established.

The foregoing pattern of Congressional action and inaction in July 1787—of course wholly overlooked by the Government—necessarily undermines completely its present contentions (Pet. Br., No. 21, pp. 55-56, 60-61, 66-67, 71) that the extension of military jurisdiction over civilians is appropriate in areas where the civil authority has not yet been fully established.

Third: It is likewise significant, in endeavoring to ascertain the views of the Founders, that the military exception in the Fifth Amendment does not suggest that the scope of "land and naval Forces" in Clause 14 could properly be broadened by anything in Clause 18. Certainly when the Bill of Rights was passing through the First Congress, the members must have been aware of the discussions of the Necessary and Proper Clause which the ratification process had evoked, and of General Knox's rejected proposal in 1787. But neither they nor the other proponents of Bills of Rights (1 Elliot 323, 326, 328, 334; 2 *id.* 177; 2 *id.* 658; 4 *id.* 243) ever suggested an exception reading "except cases arising in the land and naval forces as that term may hereafter be expanded when from time to time deemed necessary and proper," or couched in equivalent language.

There is no basis in any of the contemporary materials or in any inferences that can properly be drawn from such materials that anyone, in 1787, or 1789, or 1791, ever for a moment considered that the concept of "land and naval Forces" in Clause 14 could be broadened beyond the class

of those then subject to trial by court-martial, viz., those actually in the service, and those few functionally connected civilians who served with them "in the field," i.e., in an area of operations during a period of hostilities.

Fourth: The consistent practice, following the adoption of the Constitution, with respect to civilian dependents none of whom appear to have been tried by court-martial at any time prior to 1950 (*supra*, pp. 58-68), a practice primarily formulated by the very military authorities whose jurisdiction was in question, and that was uniformly concurred in by the law officers of the Government, shows that nothing in the Necessary and Proper Clause can enlarge the military amenability of civilian dependents and, correspondingly, withdraw them from the protection of the Sixth Amendment.

The foregoing conclusion follows on any of three independent approaches:

1. A settled authoritative construction of the Constitution, at first contemporaneous with its adoption, and then followed by practice, usage, and acquiescence over a long period is not only of very great weight, but may be well nigh conclusive. E.g., *Stuart* v. *Laird*, 1 Cranch 299, 309; *Murray* v. *Hoboken Land Co.*, 18 How. 272, 279-280; *Burrow-Giles Co.* v. *Sarony*, 111 U.S. 53, 57; *Hampton & Co.* v. *United States*, 276 U.S. 394, 412. Or, as it was phrased with characteristic felicity by Mr. Justice (then Chief Judge) Cardozo, "Not lightly vacated is the verdict of quiescent years." *Coler* v. *Corn Exchange Bank*, 250 N.Y. 136, 141, 164 N.E. 882, 884.

2. In ascertaining who may successfully claim the right of trial by jury, we look to see who, by common understanding, had that right in 1789. See, e.g., *Callan* v. *Wilson*,

127 U.S. 540; *In re Debs*, 158 U.S. 564; *District of Columbia* v. *Colts*, 282 U.S. 63; *District of Columbia* v. *Clawans*, 300 U.S. 617; *Ex parte Quirin*, 317 U.S. 1, 38-41; *Whelchel* v. *McDonald*, 340 U.S. 122, 126-127; *Green* v. *United States*, 356 U.S. 165. As has been shown (pp. 58-68, *supra*) no civilian dependent was ever tried by court-martial prior to 1950, and only two women were ever punished by the military in all that time; one without trial, one with trial, both in the 1790's, and without the approval of the civil authority.

3. In every instance that an attempt to enlarge the scope of military jurisdiction at the expense of trial by jury as it existed in 1789 has come before this Court, that attempt has failed. *Ex parte Milligan*, 4 Wall. 2; *Duncan* v. *Kahanamoku*, 327 U.S. 304; *Toth* v. *Quarles*, 350 U.S. 11; *Reid* v. *Covert*, 354 U.S. 1.

Howsoever the problem is viewed, the same conclusion always follows: Civilian dependents cannot be subjected to trial by court-martial by reason of anything in Clause 14 plus Clause 18 of Section 8 of Article I.

3. *The circumstance that, for more than a century and a half after the ratification of the Constitution, no American military lawyer ever invoked the Necessary and Proper Clause to support peacetime military jurisdiction over civilian dependents is well-nigh conclusive against such a basis for that jurisdiction now.*

"We do not write upon a clean slate." *Green* v. *United States*, 356 U.S. 165, 187; *Lee* v. *Madigan*, 358 U.S. 228, 232; *Abbate* v. *United States*, 359 U.S. 187, 190.

It is therefore impossible to consider the question of military jurisdiction over civilian dependents as a mat-

ter of first impression. That question must be dealt with against a consistent series of rulings by Attorneys General and Judge Advocates General (*supra*, pp. 29-32), all to the effect that military jurisdiction could not constitutionally be exercised over civilians, except in a time of war and at the theater of war, where military operations were in progress. Those rulings were reflected and repeated in the works of recognized military law authorities. Winthrop *146; Davis [a JAG of the Army], *A Treatise on the Military Law of the United States* (3d ed. 1915) 52-53, 478-479; Dudley [Prof. Law, USMA], *Military Law and the Procedure of Courts-Martial* (2d ed. 1908) 413-414.

The Government, which seeks to avoid the settled "in the field" limitation reflected by those authorities (Pet. Br., No. 21, pp. 33, 52-61), never once cites, much less discusses, the consistent series of Opinions of The Judge Advocate General of the Army at variance with its present position, but, as we have said (*supra*, p. 29), deals with the concept of "in the field" as though it were an aberration espoused only by Colonel Winthrop.

In *Reid* v. *Covert*, the Government argued (Appellant's Br., No. 701, Oct. T. 1955, p. 44) that "the world about which Colonel Winthrop wrote no longer exists." Here the Government attempts, primarily by repeated assertion, to demonstrate that Colonel Winthrop's world—which was also the world of numerous Attorneys General and Judge Advocates General—never existed at any time.

Of course that demonstration is facilitated by ignoring contrary precedents, and while a result so reached is hardly persuasive, we are constrained to concede that the Government's technique in thus rewriting history anticipates by precisely a quarter of a century the practices of

"reality control" described in the late George Orwell's *Nineteen Eighty-Four*.[17]

It is hardly necessary to labor the proposition that those are not approaches appropriate either for historical research or for legal arguments.

If we concentrate on, rather than shutting our eyes to, materials that reflect the legal and constitutional thinking of an earlier era, there is—indeed there must be—significance of the highest importance in this incontrovertible fact, that for almost a century after Chief Justice Marshall first demonstrated the far-reaching potentialities of the Necessary and Proper Clause in *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819), it never occurred to any military man, or indeed to any lawyer, civilian or military, that Clause 18 enlarged the scope of "land and naval Forces" in Clause 14. That revelation was first vouchsafed to Government counsel at the *Covert-Krueger* rehearing in 1957. Supp. Br. for Appellant and Petitioner on Rehearing, Nos. 701 and 713, Oct. T. 1955, pp. 64-82.

Yet neither Colonel Winthrop, nor Colonel Dudley, nor General Davis, nor the successive Judge Advocates General of the Army who formulated and published the opinions that the Government now so pointedly ignores can fairly be charged either with espousing a doctrinaire brand of liberalism, with less than full devotion to the interests and needs of the armed forces, or indeed with uncritical acceptance of any legal views simply because they emanated

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[17] "Day by day and almost minute by minute the past was brought up to date. In this way every prediction made by the Party could be shown by documentary evidence to have been correct; nor was any item of news, or any expression of opinion, which conflicted with the needs of the moment, ever allowed to remain on record. All history was a palimpsest, scraped clean and reinscribed as often as was necessary." P. 41 (1946 ed., Harcourt, Brace & Co.)

from higher authority. Witness, for example, Winthrop's disagreement with judicial opinions not shown to be erroneous until *Toth* v. *Quarles*, 350 U.S. 11 (Winthrop *143-146), and his preference for the concurring opinion in *Ex parte Milligan*, 4 Wall. 2, over the opinion of the Court (Winthrop *1275).

What the court said carried no mandate to the logical faculties of men of their stature. For these were sound, practical, tough-minded lawyers, devoted to the cause of their client, the United States Army, and devoted as well to the principles of the Constitution which they had sworn to support and defend. And it is significant that when, in 1916, Congress at the urging of General Crowder undertook to extend military jurisdiction over civilian dependents beyond the traditional limits, that extension was never sought to be justified on constitutional grounds. Indeed, it remains as the principal mystery of the 1916 revision of the Articles of War that General Crowder, who was the proponent of the jurisdiction now in question, never once mentioned, at any time, either the contrary views of Colonel Winthrop (whom he himself characterized, a few years later, as "the Blackstone of military law") or the contrary views in the 1912 Dig. Op. JAG, that had just recently been published under his supervision.[18]

We do not propose to retrace the legislative history of AW 2(d) of 1916, 1920, or 1948, or of Art. 2(11), UCMJ; that was done in full detail in the briefs in *Reid* v. *Covert*. It is sufficient to summarize the conclusion there documented, which is that Congress was never at any time ad-

[18] In its Brief in Opposition to the Petition for Certiorari in *Stout* v. *Hancock*, 146 F. 2d 741 (C.A. 4), certiorari denied, 325 U.S. 850, the Government pointed out another inadvertence of General Crowder in the course of his testimony on the 1916 Revision. Br. Op., No. 1062, Oct. T. 1944, pp. 18-19, n. 13.

vised, in 1916, or 1949-50, or at any intervening time, even of the existence of a constitutional question with respect to the trial of civilian dependents by court-martial in time of peace; and that, in fact, no issue of constitutionality was ever mooted, much less discussed, in the course of the legislative process on any of those occasions.

Consequently, we submit, it is not helpful in the present context for the Government to exhume the now discredited canard that the jurisdictional provisions of the Uniform Code are not to be questioned since they were enacted only (Pet. Br., No. 21, p. 51) "after full consideration by an eminent committee of experts and by Congress." The less said of the expertise of that committee, the kinder.

Item: Art. 3(a), UCMJ, held unconstitutional in *Toth* v. *Quarles,* 350 U.S. 11.

Item: Arts. 2(4) and 2(6), UCMJ, refused enforcement in *United States* v. *Bledsoe,* 152 F. Supp. 343 (W.D. Wash.), affirmed, 245 F. 2d 955 (C.A. 9). The Government did not seek further review.

Item: Art. 2(11) as originally enacted made applicable to all of Alaska east of long. 172° west—in total and blissful ignorance of *Rassmussen* v. *United States,* 197 U.S. 516.

It would be unnecessarily cruel to add a citation to *Reid* v. *Covert;* rather, in Mark Twain's phrase, we shall draw the curtain of charity over the rest of the scene.

So much for the committee. More to the point is the attitude and outlook of Congress during the hearings and debates on the Uniform Code—where, it cannot be gainsaid, not a word was said by anyone even to intimate that Article 2(11) presented a constitutional doubt, much less that it involved a grave constitutional issue.

It is one thing to urge that the considered constitutional views of a coordinate branch of the Government are entitled to profound respect; it is quite another to insist that a complete and utter disregard of the very existence of a constitutional question is to be similarly treated.

The issue of military jurisdiction over civilian dependents must also be considered against the circumstance that in most of the lower court decisions that on reasoned grounds sustained an extension of military jurisdiction over civilians not traditionally included therein, such extension was rested on the proposition that those were "cases arising in the land or naval forces" within the excepting clause of the Fifth Amendment. E.g., *In re Bogart,* 2 Sawy. 396, Fed. Case No. 1596 (C.C.D. Calif.); *Kronberg* v. *Hale,* 180 F. 2d 128, 130 (C.A. 9), certiorari denied, 339 U.S. 969; *Talbott* v. *United States ex rel. Toth,* 215 F. 2d 22, 26 (D.C. Cir.) (the *Toth* case below). Cf. *Ex parte Falls,* 251 Fed. 415 (D.N.J.).

Otherwise stated, those decisions regarded the Fifth Amendment as a source of power, as a grant of military jurisdiction over all "cases arising in the land or naval forces." Now, plainly enough, the Fifth Amendment was a limitation of power, not a source of power. The Fifth Amendment, together with the balance of the Bill of Rights, was adopted for the sole purpose of limiting power. Yet apparently only Winthrop (*53) was astute enough to make the obvious point that the Fifth Amendment "is rather a *declaratory recognition and sanction* of an existing military jurisdiction than an original provision initiating such a jurisdiction." Not until *Toth* v. *Quarles,* 350 U.S. 11, 14, was it authoritatively established in the decisional law that the Fifth Amendment "does not grant court-martial power to Congress." Every pre-*Toth* discussion of military juris-

diction over civilians, whether in a judicial opinion or elsewhere, must accordingly be read with caution.

The short of the matter is that, if due regard be had to the long history of considered rulings on military jurisdiction over civilian dependents, it is impossible to find in the Necessary and Proper Clause any support for the trials by court-martial of such persons.

The development of the Necessary and Proper Clause has adhered closely to what was foreshadowed for it in Chief Justice Marshall's original exposition (*M'Culloch* v. *Maryland*, 4 Wheat. 316, 421),

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Yet this seminal passage demonstrates precisely why it was that for over a century no one sought in reliance on the Necessary and Proper Clause to enlarge the scope of "land and naval Forces" in Clause 14, and why such an effort must fail today.

To deprive of the right to jury trial a group of civilians who had that right in 1789 and who were never authoritatively sought to be denied it for over a century and a quarter thereafter—

> Is not a legitimate end;
> Is not within the scope of the Constitution;
> Is twice prohibited by the Constitution; and
> Is wholly inconsistent with the spirit of the Constitution.

Indeed, in *Toth* v. *Quarles*, 350 U.S. 11, the Court said (pp. 21-22):

> "None of the other reasons suggested by the Government are sufficient to justify a broad construction of the constitutional grant of power to Congress to regulate the armed forces. That provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause."

III. The Government's Arguments as to the Alleged Necessity of Trying Civilian Dependents by Court-Martial and the Alleged Lack of Acceptable Alternatives Are Incomplete to the Point of Being Misleading.

In this case, the Government incorporates by reference its arguments in *Guagliardo* (U.S. Br., No. 21, pp. 71-82) that "Court-martial jurisdiction over civilian employees and dependents accompanying or serving with the armed forces overseas is a practical necessity," and that (*id.*, pp. 83-101) "There are no acceptable alternatives to the exercise of court-martial jurisdiction."

We shall not burden the Court with a point-by-point refutation of this material, most of which is simply a barely warmed-over version of what was unsuccessfully advanced at the *Covert* rehearing. We shall limit our reply to the obvious omissions in the Government's presentation, omissions so vital and striking that they completely undermine the factual arguments again advanced to support its claim to try civilians by court-martial.

A. *The Government omits to advise the Court that, under the NATO and NATO-type agreements, primary jurisdiction over American civilian dependents has been conceded to the foreign nations where such dependents are stationed.*

Nowhere in any brief filed up to now in connection with the pending four cases does the Government advise the Court that, under existing treaties, the United States has already conceded to the receiving states—i.e., the foreign countries where American troops are stationed—primary jurisdiction over all crimes committed by civilian dependents.

By Art. I(1)(b) of the NATO Status of Forces Agreement, TIAS 2846, 4 U.S.T. 1792, 1794, "civilian component" means a civilian in the employ of an armed service, while Art. I(1)(c) defines "dependent" as the spouse or child of a member of an armed service or of a civilian component (*id.*).

Art. VII (3)(a) and Art. VII (3)(b), 4 U.S.T. at 1800, provides as follows:

> "3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
>
> "(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
>
> "(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;
>
> "(ii) offences arising out of any act or omission done in the performance of official duty.

"(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction."

The same arrangement now obtains in Japan. See Par. 3, Amendment of Article XVII of The Administrative Agreement with Japan, TIAS 2648, 4 U.S.T. 1846, 1848.

Otherwise stated, the terms of the existing treaties make it perfectly clear that, in relation to offenses committed by American dependents abroad, the foreign government has primary jurisdiction. That is to say, the United States by solemn international agreements has provided for the very alternative to court-martial jurisdiction in this case that it still insists on representing to this Court as unacceptable.

It is proper to add that the foregoing provisions were quoted at the *Covert* rehearing, and were sought to be replied to by the Government at that time, on the footing that the foreign governments in most instances had waived their primary jurisdiction. See Reply Brief for Appellant and Petitioner on Rehearing, Nos. 701 & 713, Oct. T. 1955, pp. 68-69.

Why the Government still omits to mention treaty provisions so obviously pertinent in the present case of a civilian dependent, is not for us to say.

B. *The Government omits to advise the Court that at least one American civilian dependent has been turned over to the German courts for trial.*

The allegedly unacceptable alternative of trial of American civilian dependents by foreign courts should also be examined in the light of the fact that at least one such dependent, Mrs. Emma Cheaves, was duly turned over to the German courts for trial (*supra*, pp. 55-56).

That instance is significant because, under the German agreements pursuant to which the occupation was terminated in 1955, the German courts were conceded a narrower jurisdiction than those of the NATO countries.

We know of the *Cheaves* case because it appears in a court record in the District of Columbia.

There may have been many more such cases, reflected only in Government records not available to the general public.

At any rate, the circumstance that even a single American civilian woman has been turned over to the German courts for trial, regardless of how such turnover was accomplished, undercuts the Government's present contention that this constitutes an unacceptable alternative.

C. *The Government omits to explain why, after successfully persuading this Court to permit it to turn over the soldier Girard to the Japanese authorities for trial in a Japanese court, the possibility of similar trials in foreign courts for civilian dependents is an "unacceptable alternative."*

In *Wilson* v. *Girard*, 354 U.S. 524, the Government convinced this Court that it was entitled to turn over to the Japanese Government for trial in a Japanese Court, an American soldier, Specialist 3c Girard.

Why, then, it is a "practical necessity" for civilian dependents such as Mrs. Dial to be tried by court-martial, and why would similarly turning over such civilian dependents to foreign courts for trial constitute an "unacceptable alternative"?

That glaring contradiction is not explained in any of the lengthy briefs filed by the Government in these cases.

We do not suggest that the Government at the 1959 Term should or can be estopped by contentions it made at the 1956 Term.

We do urge, however, that since the Government in *Girard* so convincingly demonstrated that national honor and treaty obligation required it to surrender an American soldier to a foreign government for trial in a foreign court, its present arguments that necessity requires American civilians overseas to be tried by court-martial, and that their trial in a foreign court cannot be regarded as an acceptable alternative, fail by a considerable margin to carry conviction.

D. *The Government fails to explain why practical necessities require it to try by court-martial civilian dependents charged with manslaughter and why there are no acceptable alternatives for military trials of such cases, while at the same time the Government has been able, without demonstrable inconvenience, to withhold from trying in a military court civilian dependents charged with premeditated murder.*

"General propositions do not decide concrete cases." Holmes, *J.*, dissenting in *Lochner* v. *New York*, 198 U.S. 45, 76.

Whatever may have been said as an original proposition of the Government's generalized contentions as to practical necessities for, and unacceptable alternatives to, military trials of civilian dependents, the fact is that such dependents have, since *Reid* v. *Covert*, 354 U.S. 1, no longer been subject to trial by court-martial for capital offenses.

The Government neither seeks reconsideration of that decision (Br. 9), nor does it attempt to demonstrate that practical difficulties have resulted in consequence. Instead,

it repeats here the arguments rejected on the earlier occasion, without even a suggestion that there are in actual fact differences between the problem of, on the one hand, a civilian dependent woman who has committed premeditated murder in violation of Art. 118(1), UCMJ, or of a 20 year old dependent youth who has committed rape in violation of Art. 120(a), UCMJ, and, on the other, a woman charged with unpremeditated murder or manslaughter (Arts. 118(2) and 119, UCMJ, respectively), or a similar 20 year old charged with carnal knowledge in violation of Art. 120(b), UCMJ.

Unless such a differentiation is ventured, we can only conclude that its formulation is impossible.

E. *The Court should call on the Government for production of recent arrangements with foreign countries apparently at variance with the representations now made.*

In its brief in *Guagliardo* (Pet. Br., No. 21, pp. 66-71, 75-82), the Government conveys the impression that civilian dependents accompanying our troops abroad live in virtual garrison enclaves that are isolated from the local inhabitants.

That may well be the fact in certain NATO countries.

We have reason to believe that the separateness of the American contingent is less marked in at least some other areas.

The details of the arrangements with Spain (made pursuant to the basic Defense Agreement of Sept. 26, 1953, TIAS 2850, 4 U.S.T. 1895) have not been published, but in a magazine of national circulation it was pointed out that even our military personnel in that country may not wear uniforms off the base, may not establish post exchanges

in the vicinity of large cities, and may not locate establishments near national shrines. See James P. O'Donnell, *The American Invasion of Spain*, in *Saturday Evening Post*, Jan. 28, 1956, p. 26, at p. 88.

Similarly, a new agreement appears to have been negotiated with Germany, which greatly widens the extent to which German law will henceforward apply to American servicemen and their dependents. See *New Legal Era for Troops and Dependents in Germany*, in *Army-Navy-Air Force* REGISTER *& Defense Times*, Aug. 15, 1959, p. 11.

The first of these agreements appears to be classified; the second, we are advised, has been signed but has not yet been ratified, so that its terms have not yet been made public.

None the less, in view of the apparent inconsistency between the terms of the agreements just noted and the factual representations made by the Government in its briefs, we urge that the Court call on the United States to produce those agreements, for the Court's inspection alone, and under restrictions adequate to safeguard such legitimate considerations of secrecy as may exist.

F. *The claim to exercise military jurisdiction over civilian dependents is simply a naked assertion of power.*

The Board of Review in this case, composed of three Army officers, put the claim to try Mrs. Dial by court-martial far more clearly, without material omissions, and without an elaborate background of warmed-over argument.

Said Colonels Bisant, Scott, and Blackmarr (R. 22),

> "* * * we conclude that the necessity for military jurisdiction over dependents charged with non-capital offenses is sufficient to overcome the requirements of Article III and the Fifth and Sixth Amendments."

We commend these gentlemen for their candor, a quality all too infrequently met with in other aspects of the present case.

We urge, however, that this Court discountenance their rewriting of the Constitution, literally by the sword.

CONCLUSION

The judgment below releasing Mrs. Dial from custody should be affirmed.

Respectfully submitted.

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OCTOBER 1959.

APPENDIX A

Short Titles of Works Frequently Cited; Glossary of Military Law Abbreviations.

I. *Short Titles*

Elliot—Elliot's *Debates*.

Farrand—*Farrand, Records of the Federal Convention* (1911).

Heitman—Heitman, *Historical Register and Dictionary of the United States Army* (1903).

Winthrop—Winthrop, *Military Law and Precedents* (2d ed. 1896).

References are given to the original pagination as star pages [*], all of which are marginally noted in the 1920 reprint published by the War Department "for the information of the service."

II. *Military Law Abbreviations*

AGN—Articles for the Government of the Navy (prior to 1951). R.S. §1624; 34 U.S.C. [1946 ed.] §1200.

AW—Articles of War for the year in question, as noted below; those through 1874 are reprinted in Winthrop, *1478-*1537

1775. Res. of June 30, 1775, 2 J. Cont. Cong. 111.

1776. Res. of Sept. 20, 1776, 5 J. Cont. Cong. 788.

1786. Res. of May 31, 1786, 30 J. Cont. Cong. 316.

1806. Act of April 10, 1806, c. 20, 2 Stat. 359.

1874. R.S. §1342.

1916. Sec. 3 of the Act of Aug. 29, 1916, c. 418, 39 Stat. 619, 650.

1920. Ch. II of the Act of June 4, 1920, c. 227, 41 Stat. 759, 787; 10 U.S.C. [1926 through 1946 eds.] §§1471-1593.

1948. Title II of the Act of June 24, 1948, c. 625, 62 Stat. 604, 627; 10 U.S.C. [Supp. II to 1946 ed.] §§1471-1593.

Bull. JAG—Bulletin of The Judge Advocate General of the Army, 1942-1951. A continuation of Supp. I to Dig. Op. JAG, 1912-1940, *infra*.

CMR—Court-Martial Reports. Decisions of Boards of Review and of the Court of Military Appeals since 1951.

Dig. Op. JAG—Digest of Opinions of The Judge Advocate General of the Army. Editions of 1865, 1868, 1868, 1880, 1895, 1901, 1912, 1912-1940, and Supp. I (1941) to the last.

G.O.—General Orders for date and headquarters cited.

MCM—Manual for Courts-Martial. Editions for the Army through 1928; for Army and Air Force in 1949; for all services in 1951.

Op. JAG—Opinions of The Judge Advocate General of the Army, in full; 3 vols., 1917-1919.

UCMJ—Uniform Code of Military Justice. Originally enacted as Act of May 5, 1950, c. 169, 64 Stat. 108; 50 U.S.C. (1952 ed.) §§551-736. Recodified in 1956, effective Jan. 1, 1957, as 10 U.S.C. (1958 ed.) §§801-940.

Committee reports on UCMJ: H.R. Rep. 491, 81st Cong., 1st sess.; Sen. Rep. 486, 81st Cong., 1st sess.

Committee hearings: *Uniform Code of Military Justice*, Hearings before subcommittee of House Committee on Armed Services on H.R. 2498, 81st Cong., 1st sess.; *Uniform Code of Military Justice*, Hearings before subcommittee of Senate Committee on Armed Services on S. 857 and H.R. 4080, 81st Cong., 1st sess.

APPENDIX B

Statutes Involved

The constitutional provisions involved are sufficiently set forth at p. 2 of the Government's brief herein; below are conveniently collected all of the American statutory provisions purporting to subject accompanying civilians to military law.

1. Art. XXXII of 1775:

"All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army."

2. Sec. XIII, Art. 23, of 1776:

"All suttlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field, though no inlisted soldier, are to be subject to orders, according to the rules and discipline of war."

3. AW 60 of 1806:

"All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

4. AW 63 of 1874:

"All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

5. AW 2(d) of 1916 through 1948:

"Art. 2. *Persons Subject to Military Law.*—The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: * * *

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles; * * *"

6. Art. 2, UCMJ, as originally enacted in 1950:

"Art. 2. Persons subject to the code.

"The following persons are subject to this code: * * *

"(10) In time of war, all persons serving with or accompanying an armed force in the field;

"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands; * * *"

7. Art. 2, UCMJ, as recodified in 1956, effective January 1, 1957:

"§*802. Art. 2. Persons subject to this chapter*

"The following persons are subject to this chapter: * * *

"(10) In time of war, persons serving with or accompanying an armed force in the field.

"(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

8. In 1956, Art. 2(11) was amended to include Guam as one of the areas in which that Article would not apply (Sec. 23 of the Act of Aug. 1, 1956, c. 852, 70 Stat. 908, 911), and in 1959, Art. 2(11) was further amended to exclude all of Alaska from its operation (Sec. 6(b) of the Act of June 25, 1959, P.L. 86-70, 73 Stat. 141, 142).

9. Article 118, UCMJ, as revised effective Jan. 1, 1957 (10 U.S.C. §918) reads as follows:

"*§918. Art. 118. Murder*

"Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct."

APPENDIX C

Summary of the Punitive Provisions of the Earliest American Military Codes

I. *The 1776 Articles of War as amended in 1786.*

The 1776 Articles were contained in eighteen sections, the fourteenth of which was amended in 1786. As thus amended, there were 107 Articles in all.

Of these, 59 were punitive, and of those 59, 17 were capital. In the compilation that follows, the Section numbers appear in roman numerals, the article numbers in arabic numerals, and "(Cap.)" after the summary indicates a capital offense. Capital offenses are also prefixed by an asterisk.

1. I: 2, disturbing divine service.
2. I: 3, profane cursing.
3. I: 4, absence of chaplain.
4. II: 1, traiterous or disrespectful words.
5. II: 2, contempt towards the general.
*6. II: 3, mutiny (cap.).
*7. II: 4, failure to suppress mutiny (cap.).
*8. II: 5, striking superior officer (cap.).
9. IV: 4, false certificate.
10. IV: 5, false muster.
11. IV: 6, commissary taking money.
12. IV: 7, false muster, particular instance.
13. V: 1, false return.
14. V: 2, failure to make return.
*15. VI: 1, desertion (cap.).
16. VI: 2, absence without leave.

*17. VI: 3, enlisting without prior discharge (cap.).

18. VI: 4, advising desertion.

19. VII: 1, reproachful speeches.

20. VII: 2, challenges.

21. VII: 3, suffering another to fight duel.

22. VII: 4, failure to quell quarrels.

23. VII: 5, upbraiding one who refuses challenge.

24. VIII: 4, exactions by sutler.

25. IX: 1, failure to redress disorder.

26. X: 1, failure to deliver capital offenders to civil magistrate.

27. X: 2, protecting soldiers from creditors.

28. XI: 2, failure to redress soldiers' wrongs.

29. XII: 1, embezzlement of military stores.

30. XII: 2, selling or wasting ammunition.

31. XII: 3, selling, wasting or spoiling other military property.

32. XII: 4, embezzling funds.

33. XIII: 1, absence without leave.

34. XIII 2, lying out of quarters.

35. XIII: 3, failure to retire to quarters.

36. XIII: 4, failure to repair.

37. XIII: 5, officer drunk on guard.

*38. XIII: 6, misbehavior of sentinel (cap.).

39. XIII: 7, hiring of substitute.

40. XIII: 8, conniving at hiring of substitute.

*41. XIII: 9, sounding false alarms (cap.).

42. XIII: 10, quitting platoon or division.

*43. XIII: 11, violence to persons bringing provisions (cap.).

*44. XIII: 12, misbehavior before the enemy (cap.).

*45. XIII: 13, abandoning fort or quitting to pillage (cap.).

*46. XIII: 14, casting away arms and ammunition (cap.).

*47. XIII: 15, disclosing watchword (cap.).

48. XIII: 16, disorderly behavior, causing waste of private property.

*49. XIII: 17, forcing safeguard (cap.).

*50. XIII: 18, relieving the enemy (cap.).

*51. XIII: 19, correspondence with the enemy (cap.).

*52. XIII: 21, leaving to plunder (cap.).

*53. XIII: 22, compelling commander to surrender (cap.).

54. XIV: 12 (1786), disturbing proceedings of court-martial.

55. XIV: 14 (1786), breach of arrest.

56. XIV: 18 (1786), permitting prisoner to escape.

57. XIV: 19 (1786), provost marshal failing to render report.

58. XIV: 20 (1786), conduct unbecoming officer and gentleman.

59. XVIII: 5, general article.

II. *The 1806 Articles of War*

The 1806 articles were 101 in number, not divided into sections, but numbered consecutively. Sec. 2 of the enacting statute denounced spying as a capital offense.

There were 56 punitive provisions, of which 16 were capital.

The designations below follow those in Part I.

1. AW 2, disturbing divine service.

2. AW 3, profane cursing.
3. AW 4, absence of chaplain.
4. AW 5, contemptuous words against superior civil authority.
5. AW 6, contempt or disrespect towards commanding officer.
*6. AW 7, mutiny (cap.).
*7. AW 8, failure to suppress mutiny (cap.).
*8. AW 9, striking superior officer (cap.).
9. AW 14, false certificate.
10. AW 15, false muster.
11. AW 16, commissary taking money.
12. AW 17, false muster, particular instance.
13. AW 18, false return.
14. AW 19, failure to make return.
*15. AW 20, desertion (cap.).
16. AW 21, absence without leave.
*17. AW 22, enlisting without prior discharge (cap.).
*18. AW 23, advising desertion (cap.).
19. AW 24, reproachful speeches.
20. AW 25, challenges.
21. AW 26, suffering another to fight a duel.
22. AW 27, failure to quell quarrels.
23. AW 28, upbraiding one who refuses a challenge.
24. AW 31, exactions by sutler.
25. AW 32, failure to redress disorders.
26. AW 33, failure to deliver capital offenders to civil magistrate.

27. AW 35, failure to redress soldiers' wrongs.
28. AW 36, embezzlement of military stores.
29. AW 37, selling or wasting ammunition.
30. AW 38, selling, wasting or spoiling other military property.
31. AW 39, embezzling funds.
32. AW 41, absence without leave.
33. AW 42, lying out of quarters.
34. AW 43, failure to retire to quarters.
35. AW 44, failure to repair.
36. AW 45, officer drunk on guard.
*37. AW 46, misbehavior of sentinel (cap.).
38. AW 47, hiring of substitute.
39. AW 48, conniving at hiring of substitute.
*40. AW 49, sounding false alarms (cap.).
41. AW 50, quitting platoon or division.
*42. AW 51, violence to persons bringing provisions (cap.).
*43. AW 52, misbehavior before the enemy (cap.).
*44. AW 53, disclosing watchword (cap.).
45. AW 54, disorderly behavior, causing waste of private property.
*46. AW 55, forcing safeguard (cap.).
*47. AW 56, relieving the enemy (cap.).
*48. AW 57, correspondence with the enemy (cap.).
*49. AW 59, compelling commander to surrender (cap.).
50. AW 76, disturbing proceedings of court-martial.
51. AW 77, breach of arrest.

52. AW 81, suffering prisoner to escape.
53. AW 82, provost marshal failing to render report.
54. AW 83, conduct unbecoming officer and gentleman.
55. AW 99, general article.
*56. Sec. 2, spying (cap.).